Supreme Court, U.S.
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No.

In the Supreme Court of the United States

AMERICAN GRAIN TRIMMERS, INC., and FRANK GATES-ACCLAIM,

Petitioners,

v.

OFFICE OF WORKERS' COMPENSATION PROGRAMS, and MARIAN JANICH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

GREGORY PAUL SUJACK
Counsel of Record
DAVID F. BUYSSE
TODD E. WEGMAN
GAROFALO, SCHREIBER & HART, CHTD.
211 West Wacker Drive
14th Floor
Chicago, Illinois 60606
(312) 670-2000

Attorneys for Petitioners

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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QUESTION PRESENTED

Whether a properly framed opinion by a qualified physician with appropriate credentials constitutes "substantial evidence to the contrary" of the presumptions in §20 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §920, and requires a claimant to carry the burden of proving a compensable claim without the benefit of the statutory presumption.

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners, American Grain Trimmers, Inc., and its claims administrator, Frank Gates/Acclaim, were petitioners before the Seventh Circuit Court of Appeals. Frank Gates/Acclaim has no direct interest in the outcome of this Petition.

The Respondent, Marian Janich, was a respondent before the Seventh Circuit Court of Appeals. The Respondent, Office of Workers Compensation Programs, by the Director of the Office of Workers Compensation Programs, and appeared as respondent in the Seventh Circuit Court of Appeals at the request of the court.

The Court of Appeals case number was 97-3080. The Benefits Review Board case number was BRB No. 96-1218. The Office of Administrative Law Judges case number was 94 LHC 1922.

Pursuant to Supreme Court Rules 14(b) and 29.6, the following disclosure is made:

American Grain Trimmers, Inc. is a wholly owned subsidiary of Logistec, a publicly traded Canadian corporation. Frank Gates/Acclaim is a corporation without parent, subsidiary, or corporate owner of greater than 10% of its stock. A party with a pecuniary interest in the proceedings is Signal Mutual Indemnity Association, a mutual association.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, American Grain Trimmers, Inc. and Frank Gates-Acclaim, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered on June 21, 1999.

OPINIONS BELOW

The en banc Order and Opinion of the Court of Appeals for the Seventh Circuit is reprinted at App. 1 and is reported at 181 F.3d 810 (7th Cir. 1999). Although the matter had been argued before a panel of judges of the Seventh Circuit, oral arguments en banc were ordered without the issuance or publication of the panel decision.

The Decision and Order of the Benefits Review Board, reprinted at App. 23, issued on June 19, 1997 in an unpublished decision, in BRB case No. 96-1218.

The Decision and Order on Claimant's and Employer's Motions for Reconsideration by Administrative Law Judge Robert G. Mahony, dated May 2, 1996, reprinted at App. 33, was not reported.

The Decision and Order of the Administrative Law Judge Robert G. Mahony, dated March 1, 1996, was not reported, and is reprinted at App. 41.

JURISDICTION

Respondent, Marian Janich, filed a claim for death benefits for the death of her husband, Paul Janich, pursuant to the Longshore and Harbor Workers' Com-

pensation Act, 33 U.S.C. §§901, *et seq*. The formal hearing was held before Administrative Law Judge Robert G. Mahony of the Office of Administrative Law Judges of the United States Department of Labor under 33 U.S.C. §919.

The decision of the Administrative Law Judge was appealed to the Benefits Review Board pursuant to 33 U.S.C. §921(b). The final decision of the Benefits Review Board was filed on June 19, 1997.

The Court of Appeals for the Seventh Circuit had jurisdiction to review the final order of the Benefits Review Board under 33 U.S.C. §921(c).

The Order and Opinion of the Court of Appeals for the Seventh Circuit was filed on June 21, 1999. Pursuant to a motion under Rule 13.5 of this Court, Justice Stevens, on September 13, 1999, extended the time within which to file this Petition to and including October 19, 1999. Application No. 99A207. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

33 U.S.C. §920

PRESUMPTIONS

Sec. 20. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this act.

. . .

STATEMENT OF THE CASE

Marian Janich, Respondent herein, is the widow of Paul Janich, deceased, who died from a fatal cardiac incident on August 12, 1992. App. 45. The widow filed a claim for death benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq. App. 41.

The decedent had been a grain trimmer for almost 40 years and had been a gang leader for almost 38 years. App. 44.[1] He had risen to the top of the seniority list in his union. On the day he died, the decedent was working as a gang leader. His duties included directing the workers loading the barge, ordering the grain from the elevator, and monitoring the list and draft of the barge. On August 12, 1992, the decedent, and his crew of three men, loaded one barge in the morning, and began loading a second barge. During the loading of the second barge, they broke for lunch.

After lunch, while the decedent remained in the office, the crew resumed loading the second barge. Approximately one hour after lunch, it began to rain. The crew had not yet reached the "hold off" point when it began raining. The hold off point is the amount of grain initially ordered by the gang leader. When it started raining, the decedent and a federal grain inspector approached the barge. The inspector ordered the loading process to stop. The grain trimmers stopped work. Workers for the elevator company began closing the hatches on the barge.

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[1] The decision of the ALJ identifies the position as foreman. App. 44.

While the decedent and a co-worker were watching the elevator gang close the hatches, the decedent fell or collapsed. Efforts to resuscitate him were unsuccessful. The remaining crew members finished loading the barge without incident. App. 49.

It is well-established that the decedent had an extensive history of preexisting cardiac and pulmonary disease. He began treatment with a cardiologist, Dr. Castor, in 1981. The decedent had sustained a myocardial infarction of the inferior wall of the left ventricle prior to 1981. He also suffered from dilated cardiac myopathy and from heart arrhythmias. Although Dr. Castor had repeatedly recommended an angiogram, the decedent refused this diagnostic test. In 1987, the decedent developed a deficiency of blood flow in the legs, called claudication. Studies showed stenosis of the femoral arteries. App. 50. Additional testing was ordered, but refused. The decedent smoked cigarettes from at least 1981 until the time of his death. He developed diabetes in 1990. In November, 1991, he was hospitalized for congestive heart failure. The decedent's cardiac ejection function was found to be approximately ½ of the low/normal range. Upon discharge from the hospital, he was prescribed nine different medications for his heart function, blood pressure, circulation, and arrhythmias. App. 51.

Dr. Castor executed the death certificate, establishing poor ventricular function as the cause of death. App. 52. The doctor noted the decedent was a candidate for sudden cardiac death which could occur at any time, including sleeping or reading the paper. App. 52.

When asked to render opinions concerning causation of the work activities and the cardiac incident, the doctor stated that it was possible the activities could cause death, but he could not say for sure or with medical certainty "that that's the one that caused the demise." App. 53.

The employer's expert, Dr. Richard Carroll, a board-certified internist and cardiologist, reviewed the decedent's medical records. The doctor opined the decedent had extensive risk factors, including premature ventricular contractions, smoking, diabetes, dilated cardiomyopathy, and severe left ventricular dysfunction. The doctor opined that the cause of the decedent's death was sudden cardiac death that occurred without obvious precipitating cause and was not related to any work activity of record. App. 53; App. 62-64.

The ALJ found the claimant established a *prima facie* case entitling the claim to be subject to the presumption of Section 20(a) of the Act, 33 U.S.C. § 920(a). App. 56. The ALJ reviewed the employer's evidence to determine whether the presumption had been rebutted. He found the evidence did not rebut the presumption and, therefore, awarded death benefits and other remedies. App. 57. On reconsideration, (App. 33) the ALJ amended the calculation of benefits. App. 35. The issues raised by the employer on reconsideration were rejected. App. 40.

The employer appealed the decision to the Benefits Review Board of the United States Department of Labor. App. 23. The Board affirmed the decision of the ALJ. App. 32. It, too, found that the claimant had established a *prima facie* case, (App. 25-27) and upheld the ALJ's

ruling that the employer had not presented substantial evidence to contradict the presumption. App. 28-31.

The petitioners filed a timely Petition for Review with the United States Court of Appeals for the Seventh Circuit, raising the same issues that had been raised before the Benefits Review Board. App. 1. The matter proceeded to oral arguments before a three judge panel of the court. On the court's own motion, and without a panel decision issuing, the court ordered oral arguments *en banc*. The majority of the judges affirmed the decision of the Benefits Review Board. App. 16. The opinion of the court below issued on June 21, 1999. The petitioners did not seek re-hearing on the issue.

The court below found that the ALJ acted properly in assessing the credibility of the evidence submitted in rebuttal of the presumption. App. 13-15. The court interpreted Section 20(a) (33 U.S.C. § 920(a)) of the Longshore Act in determining whether "substantial evidence" to rebut the presumption had been presented by the employer. Based on the assessment of credibility by the ALJ and the court's interpretation of Section 20(a), the decision was affirmed.

Jurisdiction was proper in the Court of Appeals under 33 U.S.C. §921(c). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE WRIT

The decision of the court below is in conflict with the decisions of the Court of Appeals for the First Circuit. The Seventh Circuit held that an opinion rendered by a properly credentialed medical expert, with the usual expert caveats as to medical certainty, does not amount to the level of "substantial evidence" sufficient to rebut the presumption contained within §20 of the Longshore and Harbor Workers' Compensation Act ["the Act"], 33 U.S.C. §920. The decision below either creates "uncertainty about [the lower court's] approach in future cases or [ ] establish[es] a far more demanding (and novel) version of the substantial evidence standard." App. 22. This conflict will cause confusion for adjudicators and attorneys operating under the Act, as they will be forced to choose between two irreconcilable interpretations.

Under the Act, Congress carefully calibrated the administrative scheme to allow for the orderly resolution of claims by longshore workers against their employers. Congress created §20 presumptions to ease the worker's burden in prosecuting a claim. While the coverage of the presumption is debatable (*U.S. Industries / Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 612 (1982)), the burden placed on employers to rebut the presumption is phrased in the familiar statutory requirement of "substantial evidence to the contrary." Thus, the question is important for future administration of the Act. The decisions of the court below and the administrative bodies effectively nullify the operating language of the Act.

The First Circuit, in construing the burdens placed on the employer by §20 of the Act, held that whether the

employer presented substantial evidence is a question of law. The court held that §20 does not require production of anything more than substantial evidence, nor does it shift the burden of persuasion on the ultimate issues. *Bath Iron Works v. Director, OWCP*, 137 F.3d 673 (1st Cir. 1998). The assessment of credibility of the rebuttal evidence is irrelevant to the determination of whether the evidence meets the minimum quantum. *Id.* at 675. The employer is only required to rebut the presumption, not disprove all potential avenues of causation. "[The doctor's] opinion was found insufficient by the Board, however, because he could not exclude possibilities—a typical expert opinion. This put an impossible burden on the employer." *Id.*

The court below upheld the rejection of Dr. Carroll's rebuttal opinions. This can only occur if the question is analyzed not as a matter of law, but with deference to the finding of the ALJ. The dissent of Chief Judge Posner noted that Dr. Carroll "could not achieve metaphysical certainty" and acknowledged the limitations of medical science. "Had he opined with greater definitiveness, his opinion would have been suspect. Apparently, no honest medical opinion in the employer's favor would carry any weight with this administrative law judge." App. 17.

The ALJ determined that the opinions of Dr. Carroll were not sufficient to rebut the presumption on the grounds that the opinions given by Dr. Carroll used the phrase "I don't know" in trying to respond to various hypothetical questions presented by counsel for the claimant. However, Dr. Carroll's opinions were rendered to a reasonable degree of medical certainty. The testi-

mony of Dr. Carroll on cross examination demonstrates that the ALJ clearly took the doctor's commentary out of context to achieve a desired result. App. 66-69. As noted in the dissent of the chief judge, "If the Department of Labor is free to disregard medical evidence of the quality and specificity of Dr. Carroll's it will have been empowered to read out of the statute the requirement that the worker's injury, to be compensable, have been employment related." App. 19.

In contrast to the holdings of the First Circuit, the court below affirmed the decision of the Benefits Review Board. This sanctioned shifting of the ultimate burden of persuasion to the employer. Shifting the burden of persuasion to employers was found to be impermissable by this court in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). This is most strikingly demonstrated by the decision of the ALJ on reconsideration, where, relying on precedents of the Benefits Review Board, he explicitly states that the presumption contained within §20 shifted the burden of "*proof*" [emphasis in original] to the employer to disprove the elements of the presumption. App. 38. "This conclusion may have been appropriate for a party bearing the burden of proof, but not for a party whose only burden was to produce substantial evidence." App. 21. "The ALJ's statement only makes sense if he (mistakenly) believed that the employer retained the burden of proof on the question of causation and had to refute the presumption of coverage by at least a preponderance." *Id.*

Although calling the choice of language by the ALJ in his decision on reconsideration "unfortunate" (App. 14-

15), the court below nevertheless ratified the shifting of the burden of persuasion by the ALJ and by the Benefits Review Board. The Board's precedents require that the employer "establish that work events neither directly caused the injury or death nor aggravated the preexisting condition resulting in injury or death," (App. 28) also shifting the burden of persuasion to the employer. The First Circuit has noted the Board's decisions impose an unattainable level of production different than that required under the statute. *Bath Iron Works*, *supra*.

The process accepted by the court below that requires the evidence presented by an employer to rebut the presumption be sufficient to persuade the ALJ on the ultimate issue is contrary to the statutory language. The Board compels an employer to disprove non-existent facts, a logical absurdity. It also creates a procedural hurdle that cannot be cleared, transmogrifying a rebuttable presumption into one that is irrebuttable. This administratively imposed burden, created without support of the statute or independent case law, is greater than proof "beyond a reasonable doubt," the burden the prosecution faces in a criminal prosecution.

The ALJ should have simply determined whether a reasonable person would have accepted the opinions of Dr. Carroll. One of the dissenting opinions of the court below felt that this was a required step. App. 21-22, Flaum, J. Assigning weight against the credibility of the rebuttal opinion was also erroneous. To the contrary, any weight assessed should have been accorded against the presumption. *U.S. Industries*, *id.* at n.5; Graham, *Handbook of Federal Evidence*, 3d Ed. (1991) §301.12. This is

done in a manner similar to determining whether to refuse to direct a verdict in a jury case, the process adopted by the Tenth Circuit in determining substantial evidence. *Hoyl v. Babbitt*, 129 F.3d 1377, 1383 (10th Cir. 1997). The trial court would see if "there is no genuine issue as to any material fact." F.R.C.P. 56. Credibility questions are weighted against summary judgment. *Maffei v. Northern Insurance Co. of New York*, 12 F.3d 892 (9th Cir. 1993); *Allen v. United Transportation Union*, 964 F.2d 818 (8th Cir. 1992). The measurement of this evidence is the function of a judge, not the function of a finder of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). As the measurement is only judicial, assessments of quality and credibility should not be undertaken at this stage of the proceedings.[2] The judge merely determines whether there is an issue for trial. *Id.*

The ALJ's function is also similar to that involved in questions of conditional relevancy under Rule 104(b) of the Federal Rules of Evidence. "The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . ." *Huddleston v. United States*, 485 U.S. 681, 690 (1988). Thus, only at the conclusion of the hearing would it be appropriate to assess fully the credibility of the witnesses.

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[2] The court below also suggested that the evidence in opposition to the presumption was speculative or otherwise inadmissible, suggesting a similarity with a speculative affidavit that should be stricken under F.R.C.P. 56. However, neither the ALJ , nor the claimant sought to strike the testimony of Dr. Carroll. Thus, the court below should not have taken it upon itself to do so merely to uphold the administrative decision.

Dr. Carroll's opinions were such that a reasonable fact finder would find them credible. Reasonableness is clearly shown in both dissenting opinions below. Both dissents state that the evidence presented was substantial and did rebut the presumption. As a number of members of the court joined in the dissents, it cannot be said that no reasonable person would find in accordance with the opinions of Dr. Carroll. As such, as a matter of law, the evidence should be found "substantial" consistent with decisions of this court. These dissents demonstrate the error of the approach of the court below and outline clearly the conflict with the First Circuit.

In the administrative decisions below, the ALJ and the Benefits Review Board both recite the proper incantations as to burdens of proof and persuasion. However, the incantations bring to mind the adage "actions speak louder than words" when the actual result of their decisions is to shift the burden of proof and persuasion to employers. The First Circuit properly detected and rejected the administrative duplicity. Unfortunately, the failure of the court below to similarly reject this duplicity has created this conflict between circuits that will significantly affect practice under the Act.

This Court has previously frowned upon such duplicitous actions by administrative bodies. "It is certainly conceivable that an adjudicating agency might consistently require a particular substantive standard to be established by a quantity or character of evidence so far beyond what reason and logic require as to make it apparent that the *announced* standard is not *really* the effective one." *Allentown Mack Sales and Service, Inc. v.*

NLRB, 522 U.S. 359, ___, 118 S.Ct. 818, 826 (1998). This Court should grant the writ to demonstrate clearly what is required under the statute.

The decision of the court below also brings to mind the adage. ". . . [A]ffirming the ALJ's decision undermines the very approach announced today." App. 20. While the lower court proclaimed allegiance to the definition of "substantial evidence" set forth in *Steadman v. SEC*, 450 U.S. 91 (1981), its fealty wavered by allowing qualitative analysis to creep into the determination of "substantive evidence," rather than limiting the analysis to quantitative analysis.[3]

Apparently, the conflict between the circuits derives from the construction of "substantial evidence," as set forth in *Steadman* by the court below. This construction occurred to the seeming exclusion of the numerous decisions of this Court defining the phrase. Substantial evidence requires submission of evidence that runs from more than a mere scintilla to less than a preponderance. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). The evidence need only be that which a reasonable mind might accept as adequate to support a conclusion. *Id.*, citing *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1928). The presumption places an obligation on a party to present a minimum quantum of evidence against the pre-

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[3] Even the court below assessed the credibility of Dr. Carroll. This was error, as the court should only have determined whether a reasonable person could have accepted Dr. Carroll's opinions.

sumption, nothing more. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n.8 (1982).[4]

Despite these precedents, the court below attempted to construe the statutory phrase in light of this court's ruling in *Steadman* of whether the conduct meriting a sanction by the Securities Exchange Commission must be proven by a higher standard of evidence than a preponderance under §7(c) of the Administrative Procedures Act (5 U.S.C. §556(d)) [hereinafter, "APA"]. App. 12. This Court held that §7(c), by requiring "reliable, probative, and substantial evidence," established the standard of proof for those cases. 450 U.S. at 98.

The extent of the reliance on *Steadman* was error for a number of reasons. Unlike §7(c) of the APA, the Longshore Act requires that rebuttal evidence only be substantial, not "probative" or "reliable." More importantly, the rebuttal analysis arises at a different procedural stage in Longshore cases. The case is not ripe for final adjudication. In the interim setting, only substantial evidence is needed. At the end stage, the evidence must then be reliable, probative, and substantial. ". . . Thus, while the words 'reliable' and 'probative' may imply quality of evidence concerns, the word 'substantial' implies quantity of evidence." *Steadman* at 98, n.17.

However, this important distinction is lost on the court below, as it required the evidence meet the ultimate burden of production, despite the clear relevancy of Dr. Carroll's opinions. "Nevertheless, the purpose for which

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[4] These definitions are consistent with the analysis above discussing directed verdicts or conditional relevance. *Supra* at 11.

the evidence being introduced has no necessary connection to the amount of evidence needed to serve that purpose." App. 12. This clearly transforms the burden in rebutting the presumption into the functional equivalent of refuting the claim by a preponderance of the evidence. This erroneously produces further support for the decisions of the Benefits Review Board which shift the burden of persuasion. Certainly, this is in stark contrast to the decision of the First Circuit.

The court below further erred in requiring more than a quantity of relevant evidence. This Court's prior decisions noted above have also consistently held "substantial" to require only a certain quantity of relevant evidence. Yet, despite this clear line of authority, the court below construed "substantial evidence" as also requiring a certain quality of evidence.[5] There was no reason within the statute or the decisions of this Court for the court below to deviate from *Steadman*, *Richardson*, and *Burdine* to hold that "substantial evidence" required anything but a certain quantum of relevant evidence.

The decision of the court below creates conflict with the decision of the First Circuit. Substantial evidence is presented when an employer submits relevant opinions by a Board certified cardiologist to rebut the presumptions

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[5] The holding of the court below seems to be in conflict with its prior decisions, which noted substantial evidence was more than a scintilla that would be adequate to support the opposite conclusion. *Freeman United Coal Mining Co. v. Hunter*, 82 F.3d 764 (7th Cir. 1996). The opinions below do not address this apparent discrepancy.

in §20 of the Longshore Act. Rejecting the opinions for failure to exclude all avenues of liability impermissably shifts the burden of persuasion to the employer. A properly qualified opinion should, as a matter of law, rebut the presumption, consistent with the decision of the First Circuit and the statutory scheme created by Congress.

The dissenting opinions of the Seventh Circuit properly noted that the majority opinion effectively eliminated the ability of the Employer to rebut the presumptions contained within the Act. Chief Judge Posner, with whom Judges Coffey, Easterbrook and Manion joined, found that the administrative decisions eliminated the requirement that the worker's injury be related to his or her employment. Judge Flaum, joined by Judge Manion, believed that the majority opinion sanctioned the shifting of the burden of ultimate persuasion.

The instant case would allow this Court the opportunity to resolve the conflict between the court below and the First Circuit. Practitioners and Administrative Law Judges will need the determination of the proper method for evaluating rebuttal evidence and applying the rebuttal evidence in the context of §20 in formal hearings under the Longshore Act. This will have far reaching effects, covering not only claims under the Longshore Act and its extensions, but any other act which places a rebuttal burden on a party.

The instant case would also allow this Court the opportunity to state explicitly that the burden placed on an employer by the statutory presumption is only a burden of production, requiring that an employer need only present nothing more than a quantum of evidence that

would be accepted by a reasonable person to rebut the presumption. This is required by due process, prior decisions of this Court, by the Administrative Procedures Act, and by the Longshore Act.

CONCLUSION

For the reasons stated above, petitioner's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GREGORY PAUL SUJACK
Counsel of Record
DAVID F. BUYSSE
TODD E. WEGMAN
GAROFALO, SCHREIBER
& HART, CHTD.
211 West Wacker Drive
14th Floor
Chicago, Illinois 60606
(312) 670-2000

Attorneys for Petitioners

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 97-3080

AMERICAN GRAIN TRIMMERS, INC.,
and FRANK GATES-ACCLAIM,

Petitioners,

v.

OFFICE OF WORKERS' COMPENSATION
PROGRAMS, and MARIAN JANICH,

Respondents.

On Petition for Review of a Final Order
of the Benefits Review Board.
BRB No. 96-1218.

ARGUED DECEMBER 17, 1998—DECIDED JUNE 21, 1999

Before POSNER, *Chief Judge,* and BAUER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, ROVNER, DIANE P. WOOD, and EVANS, *Circuit Judges.**

DIANE P. WOOD, *Circuit Judge.* Like a number of other federal statutes, the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, establishes a compensation scheme for workers who suffer injury or death on the job. In order to facilitate the initial task of a claimant under the Act, there is a statutory presump-

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* Circuit Judge Cummings did not participate in the consideration or decision of this case.

tion of coverage that is triggered if certain basic facts can be established. This case concerns the next step in the process: what exactly must an employer do to rebut that presumption by "substantial evidence to the contrary," and whether the employer here met that burden.

I

Paul Janich worked for approximately 40 years as a grain trimmer for petitioner American Grain Trimmers, Inc. (AGT), and for all but his first two years he was a foreman. The grain trimmers' job is to assist in loading grain onto barges for shipping on the Great Lakes. As a foreman, Mr. Janich was responsible for supervising the process of filling the barges with grain. This required him to estimate how much grain a barge would hold (usually from 44,000 to 60,000 bushels, or 1,100 to 1,500 tons), to direct the crew to distribute the load so that the barge would not list, and to ensure that the depth of the boat's keel below the water line did not exceed the applicable draft limitations. In order to achieve the proper balance, the foreman holds back a portion of the estimated grain the barge will take so that it can be used for final adjustments. In addition, the foreman provides occasional assistance to the other grain trimmers, makes sure enough union members show up to do the work, and arranges for replacement workers if necessary.

The summer of 1992 was a busy one for the grain trimmers in Chicago. Mr. Janich, whose health history we describe in more detail in a moment, returned to work after a lengthy absence on July 6, 1992. Because of his seniority, he was able to work long hours; in the 38 days between July 6 and his death on August 12, 1992, he worked between 29 days (217.5 hours) and 33 days (258.5 hours). On the day before the fatal incident, Mr. Janich went home from work between 3:00 and 4:00 p.m. and told his wife he was tired. The next morning, he woke up at 7:00 a.m. and started work at 8:00 a.m. It was raining

intermittently. Before he broke for lunch at noon, his crew had finished loading one barge. After lunch, they began loading a second one, while Mr. Janich (as was common) monitored their progress by radio from the nearby office. By 1:30 p.m., it was raining hard. This was a serious problem for the loaders, because the grain needed to be kept dry. Mr. Janich and a Department of Agriculture inspector came out of the office and instructed the crew to stop loading and leave the barge, so that the elevator workers could close the hatches. While Mr. Janich stood on the dock watching this process, he collapsed. Several people tried to resuscitate him, and he was rushed away by an ambulance, but he never recovered. The death certificate reported that he had died of cardiopulmonary arrest due to dilated cardiomyopathy and diabetes mellitus.

Mr. Janich indeed had suffered from heart problems, and serious ones, for a long period of time. His difficulties first surfaced in 1980, when he underwent medical tests for chest pain. For some 30 to 40 years, he had been a 2-3 pack-a-day smoker, but he had reduced his smoking to 15 cigarettes per day by the time of the tests. The tests revealed that at some uncertain time in the past, he had suffered an inferior wall myocardial infarction (*i.e.*, a heart attack). In 1981, Dr. Conrado Castor, who was board certified in internal medicine and cardiovascular disease, began treating him for that condition. In April 1981, Dr. Castor diagnosed him with ventricular arrhythmia and prescribed Quinaglute, a drug, to control the heart irregularities. By 1987, Mr. Janich had also developed intermittent claudication, a deficiency in the blood flow to leg muscles due to the obstruction of the arteries that supply that area. The year 1990 brought a diagnosis of diabetes mellitus, for which he also received prescription medicine. In November 1991, Mr. Janich developed mycoplasma bronchitis with chronic obstructive pulmonary disease and was hospitalized for almost two weeks. While he was in the hospital, Dr. Castor also checked his cardiac condition again, and discovered congestive heart

failure, dilated cardiomyopathy, and arrhythmia. In lay terms, Mr. Janich had a dilated, enlarged, and weak heart.

After the November 1991 hospitalization, Mr. Janich did not return to work until July 6, 1992, as noted above. By March 1992, Dr. Castor detected some improvement in the heart functioning, although it was still not good. In May 1992, Dr. Castor examined Mr. Janich and found his condition was stable, meaning that he had no heart failure, arrhythmias, shortness of breath, angina, or chest pain. This did not mean Mr. Janich had been restored to perfect health; it just indicated that Dr. Castor found no acute condition during the examination.

II

After Mr. Janich's death, his widow Marian Janich (respondent here) filed a claim for death benefits under LHWCA § 9, 33 U.S.C. § 909. Administrative Law Judge (ALJ) Robert G. Mahony held a hearing pursuant to LHWCA § 19(d), 33 U.S.C. § 919(d), at which Mrs. Janich and AGT submitted lay and expert evidence. Under § 9, death benefits are payable to the eligible survivors of an employee whose death is the result of a workplace injury. Like most claimants, Mrs. Janich attempted to establish her right to benefits by taking advantage of the statutory presumption created in § 20(a) of the Act, 33 U.S.C. § 920(a). In order to do so, she had to establish that her deceased husband suffered a harm and that either a workplace accident occurred or that conditions at the workplace existed that could have caused the harm. (This is sometimes also referred to as the "*prima facie* case" that the claimant must establish.) Here, the ALJ found that Mrs. Janich had done so. He relied on a number of facts from the record: (1) a harm obviously occurred to Mr. Janich when he collapsed and died; (2) Mr. Janich died during the course of employment; (3) Dr. Castor's testimony, which the ALJ credited, showed that either physi-

cal exertion or workplace stress could have caused Mr. Janich's heart attack; and (4) in the moments before his death, Mr. Janich walked to the barge and ordered, perhaps by shouting, that the loading stop because of heavy rain, activities that involved both physical exertion and stress.

Section 20(a), however, merely creates a presumption that the claim comes within the Act, and the employer is entitled to rebut it. In his principal opinion in the case, the ALJ described the employer's burden as follows:

> Once Claimant establishes a *prima facie* case, the burden shifts to Employer to go forward with countervailing evidence to rebut the presumption that decedent's death was caused or aggravated by his employment. If the presumption is rebutted, it drops from the case and the claim must be decided on the record as a whole.

OWCP No. 10-32147 at 12 (Mar. 1, 1996). The ALJ also made a statement about the type of evidence the employer needed to produce in order to overcome the § 20(a) presumption: it had to be "specific and comprehensive evidence, not speculation." *Id.*

On the record before him, the ALJ concluded that AGT had not sustained its burden. AGT's principal witness was Dr. Richard J. Carroll, who qualified his opinion about the cause of Mr. Janich's death so much that the ALJ concluded it was insufficient to rebut the presumption. For example, while Dr. Carroll testified that Mr. Janich probably experienced sudden cardiac death from a lethal cardiac arrhythmia, and that there was no reason to believe that his occupation "in any way caused or aggravated the situation leading to his death," Dr. Carroll also said that "to say exactly what the cause of death is is speculative at best." *Id.* at 10-11. In addition, the ALJ found that Dr. Carroll's conclusion that Mr. Janich's death was unrelated to his work was undermined by the doctor's concession that he did not know if the cumulative effect of the

amount of time Mr. Janich had worked in the 38 days prior to his death could have been a precipitating cause of his death. All in all, the ALJ chose to credit Dr. Castor's account over that of Dr. Carroll (and for that matter over that of Dr. Nathaniel Greenberg, who also testified for Mrs. Janich) and found that AGT had not successfully rebutted the presumption.

With the presumption unrebutted, the ALJ ruled that Mrs. Janich was entitled to benefits. Ordinarily, that would have meant 50% of Mr. Janich's average weekly wage payable during Mrs. Janich's widowhood (with other adjustments if there were surviving children), plus two years' compensation in a lump sum upon remarriage, and reasonable funeral expenses not exceeding $3,000. LHWCA § 9(a), (b), 33 U.S.C. § 909(a), (b). The statute also makes provision for cases like Mr. Janich's, however, where the employee was, unfortunately, an accident waiting to happen. See LHWCA § 8(f), 33 U.S.C. § 908(f). Under that section, if the total permanent disability or death of an employee is "found not to be due solely to [the workplace] injury" but was in part caused by a preexisting condition, then the *employer's* duty to make compensation payments is limited to 104 weeks only. Under § 8(f)(2), the employee or his survivor entitled to benefits receives the balance from a special fund established under § 44 of the Act, 33 U.S.C. § 944. It was undisputed in Mr. Janich's case that AGT was entitled to § 8(f) relief, and the ALJ so ordered.

Matters became somewhat confused when the ALJ issued a second Decision and Order subsequent to motions for reconsideration filed by both parties. In that order, the ALJ adjusted the base wage rate for Mrs. Janich's benefits, and he denied AGT's challenge to his conclusion that the § 20(a) presumption had not been rebutted. Specifically, ALJ Mahony rejected AGT's argument that he required the employer to present more evidence to rebut the presumption than he should have, under the LHWCA and applicable case law. The language used in this second or-

der is confusing and possibly conflicting. On the one hand, the ALJ stated that "I agree with Employer that the presumption created by Section 20(a) is a 'bursting bubble' insofar as it drops from the case once it is rebutted." 30 BRBS 547(ALJ), 548 n.2 (1996). On the other hand, the ALJ also stated that "Section 20(a), once invoked, shifts the burden of *proof* to employer on the issue of causation . . . ." *Id.* at 549. In the final analysis, however, the ALJ reiterated that he had found the presumption unrebutted because the employer produced only Dr. Carroll's speculations about the cause of Mr. Janich's death.

AGT then appealed to the Benefits Review Board (BRB), which affirmed the ALJ's decision to award benefits. The BRB first found that substantial evidence supported the ALJ's decision that Mrs. Janich established her *prima facie* case and was entitled to the § 20(a) presumption. It then described the employer's burden as follows:

> Once the Section 20(a) presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial evidence. . . . It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. . . . Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury or death nor aggravated the pre-existing condition resulting in injury or death. . . . If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole.

BRB No. 96-1218 at 3-4 (Jan. 19, 1997) (internal citations omitted). Based on that understanding of the ALJ's approach, the BRB upheld the finding that AGT's evidence was insufficient to rebut the presumption, because Dr. Carroll's opinion was "based on speculation and probabilities" and he admitted he did not know anything about the cumulative effect of the amount of time Mr. Janich had

been working prior to his death. The BRB then affirmed the ALJ's decisions.

III

On appeal, AGT has presented four arguments: (1) Mrs. Janich was not entitled to the § 20(a) presumption; (2) the ALJ applied the wrong legal approach to the employer's burden of rebutting the § 20(a) presumption; (3) as a matter of fact, the employer presented enough evidence to rebut the presumption; and (4) as a matter of fact, the evidence refuting Mrs. Janich's right to benefits was so strong that the employer is entitled to judgment now. In our view, substantial evidence supports the ALJ's decision to invoke the § 20(a) presumption in favor of Mrs. Janich, for the reasons the ALJ mentioned; we therefore do not discuss that point further. Similarly, we think it clear on this record that the evidence was not so one-sided that AGT would be entitled to judgment here and now, and we therefore reject its fourth point. That leaves points 2 and 3, which require full exposition.

A. *What an Employer Must Do To Rebut the § 20(a) Presumption*

Our starting point for considering exactly what an employer must do to rebut the § 20(a) presumption, and where that leaves this case, is the language of the statute. It is simple and straightforward:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920. As a first cut, this language has been interpreted to mean that the claimant must establish her *prima facie* case, and then the "burden" shifts to the em-

ployer to show that "substantial" evidence exists that indicates that the claim does not fall within the statute. Embedded within that statement, however, are two fundamental questions: first, what kind of burden shifts to the employer, a burden of production or a burden of persuasion; and second, what quantity or quality of evidence is enough to satisfy that burden, whether it relates to production or persuasion.

As early as 1935, the Supreme Court used language in a decision under § 20 of the LHWCA that strongly suggested that the statute shifts a production burden to the employer, not a persuasion burden, albeit in the context of the section of the Act forbidding compensation if an injury is self-inflicted. In *Del Vecchio v. Bowers,* 296 U.S. 280 (1935), the Court wrote as follows:

> . . . the claimant, in the absence of substantial evidence to the contrary, shall have the benefit of the presumption of accidental death. The employer must rebut this *prima facies*. The statement in the act that the evidence to overcome the effect of the presumption must be substantial adds nothing to the well understood principle that a finding must be supported by evidence. Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence.

Id. at 286 (footnotes omitted). Years later, in *Director, Office of Workers' Compensation Programs v. Greenwich Collieries,* 512 U.S. 267 (1994), the Court addressed a closely related problem: the validity of the Department of Labor's "true doubt" rule, under which it found for the claimant in cases where the evidence (apart from presumptions) was evenly balanced. The Court found that the "true doubt" rule violated § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d). *Id.* at 281. In the course

of so ruling, it necessarily decided that both APA § 7(c) and the LHWCA (because §7(c) applies to adjudications under the Act) require the claimant to bear the ultimate burden of persuasion in these cases. See *id.* at 271.

At least in terms of the way the responsibilities of the litigants develop over the course of a proceeding (as opposed to the specific requirements imposed by this statute on the evidence the employer must produce), we think this area is analogous to the familiar burden-shifting approach used in employment discrimination cases. See, *e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Under *McDonnell Douglas*, the plaintiff's establishment of a *prima facie* case establishes a judge-made presumption that the employer unlawfully discriminated against the employee. The defendant employer then has the burden of producing evidence that the adverse action was taken for a legitimate, nondiscriminatory reason, by "'clearly set[ting] forth, through the introduction of admissible evidence,' reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's*, 509 U.S. at 507, quoting from *Burdine*, 450 U.S. at 254-55 (emphasis in original). Once the employer has met that burden of production, the Court held in *St. Mary's*, the presumption dissolves and the plaintiff is left with the ultimate burden of persuasion on the evidence as a whole, in keeping with Fed. R. Evid. 301.

Del Vecchio and *Greenwich Collieries* tell us that exactly the same approach governs the adjudication of LHWCA cases in which the statutory presumption of § 20(a) is invoked. The only difference between the LHWCA cases and the *McDonnell Douglas* line of cases is that the latter have a judicially created presumption, while the presumption is statutory in the former. But once we know from *Greenwich Collieries* that the burden of persuasion rests

at all times on the claimant, by force of APA § 7(c), it is plain that the source of the presumptions makes no difference. We therefore hold that the burden in LHWCA cases that shifts to the employer is a burden of production only.

Next, we must decide how much evidence the employer must produce in order successfully to rebut the presumption—or, in Professor Thayer's more colorful phrase, burst the bubble and require the plaintiff to prevail solely on the evidentiary record without the benefit of any presumption. See 2 McCormick on Evidence § 344 (4th ed. 1992); see also 9 Wigmore on Evidence § 2487(d). Here § 20(a) on its face gives more guidance than the Supreme Court did in the employment discrimination cases: it requires "substantial evidence" to the contrary. Because the term "substantial evidence" occurs in a number of different contexts, see *Steadman v. SEC*, 450 U.S. 91, 100 (1981), we must decide what it means as it is used in § 20(a).

As an initial matter, it is useful to distinguish between two closely related concepts that are often linked in administrative review cases: first, "substantial evidence," and second, a "preponderance of the evidence." The Supreme Court clarified the difference between the two ideas in *Steadman*. The term "preponderance of the evidence," the Court explained, relates to "the degree of proof which must be adduced by the proponent of a rule or order to carry its burden of persuasion in an administrative proceeding." 450 U.S. at 95. If that degree is a preponderance, then the initial trier of fact must believe that it is more likely than not that the evidence establishes the proposition in question. If that degree is "clear and convincing evidence" or "beyond a reasonable doubt," then the trier of fact must find that the evidence ever more forcefully establishes the proposition. But it is well established that the initial trier of fact, whether it is an administrative agency, a trial court, or a jury, does not simply stack up quantities of evidence on both sides and see which pile is higher. One compelling witness, or one

"smoking gun" document, can overwhelm ten contrary witnesses or a raft of papers, if the trier of fact chooses to believe the one witness and to disbelieve the ten, or it credits the one document and finds the collection wanting.

The critical point is thus whether the evidence that the trier of fact chooses to believe is substantial enough in quantity to support the finding that was made. In *Steadman*, the Court was considering a statute that allowed sanctions to be imposed under the securities laws only when they were in accordance with substantial evidence. It held there that "[t]he word 'substantial' denotes quantity. The phrase 'in accordance with . . . substantial evidence' thus requires that a decision be based on a certain quantity of evidence." 450 U.S. at 98 (footnote omitted). It also noted that the statute's requirements for relevance, as well as the need to rest a decision on reliable and probative evidence, added a qualitative dimension to § 7(c) as well—a dimension equally applicable here, given the *Greenwich Collieries* holding that § 7(c) applies to LHWCA cases. See *Steadman*, 450 U.S. at 98 n.17.

There are many phrases well known to the law that attempt to describe exactly how much evidence is "substantial" enough to justify a particular result. For example, in *Richardson v. Perales*, 402 U.S. 389 (1971), the Supreme Court described it as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 401, quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). See also *Pierce v. Underwood*, 487 U.S. 552, 564 (1988); *Maggard v. Apfel*, 167 F.3d 376, 379 (7th Cir. 1999); *Griffith v. Callahan*, 138 F.3d 1150, 1152 (7th Cir. 1998). In this case, we are talking about the amount of evidence an employer must produce in order to rebut a presumption, rather than the amount a proponent of a rule must introduce in order to sustain a favorable ruling on appeal. Nevertheless, the purpose for which the evidence is being introduced has no necessary connection to the amount of evidence needed to serve that purpose. We note also that the Supreme Court

articulated much the same standard for the employer's burden of production in an employment case in *St. Mary's*, where it imposed on the employer the responsibility of introducing, through admissible evidence, "reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action." 509 U.S. at 507 (emphasis in original). That is the same thing as requiring the employer to introduce "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See also *Del Vecchio*, 296 U.S. at 286 ("Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case."). Just as in *St. Mary's*, this does not mean that any burden of persuasion has shifted to the employer. To the contrary, it describes the evidence that the employer both in LHWCA cases and in employment cases must introduce in order to dissipate a presumption favorable to the plaintiff. Once such evidence is in the case, the presumption disappears and the trier of fact must decide the case based solely on evidence of record.

B. *Whether This Employer Successfully Rebutted the § 20(a) Presumption*

In this case, the ALJ described the "substantial evidence" burden of the employer as a requirement of introducing "specific and comprehensible evidence, not speculation," before the § 20(a) presumption would be defeated. We see nothing inconsistent in this formulation with the standards we have discussed above; a requirement of specificity is not the same thing as a shift in the burden of proof. Indeed, we routinely reject vague and speculative affidavits when they are submitted by a party seeking to defeat a motion for summary judgment that has been filed against it. See *Abioye v. Sundstrand Corp.*, 164 F.3d 364, 368 (7th Cir. 1998); *Drake v. Minnesota Mining and Mfg. Co.*, 134 F.3d 878, 887 (7th Cir. 1998); *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir.

1997). Just as in *Del Vecchio* and *St. Mary's*, the employer here had to introduce admissible evidence that, if believed, would have supported a finding in its favor. The ALJ simply found that Dr. Carroll's testimony was so hedged and speculative that it did not, even taking it at face value, undercut Mrs. Janich's *prima facie* case.

We agree. The scope of our review of an administrative decision is limited. When considering an appeal from the BRB, we evaluate the propriety of the ALJ's underlying decision. In so doing, we ask whether the ALJ's decision is "supported by substantial evidence, in accord with the law, and not irrational." *Lovilia Coal Co. v. Williams*, 143 F.3d 317, 322 (7th Cir. 1998). See also *Ziegler Coal Co. v. Kelley*, 112 F.3d 839, 841 (7th Cir. 1997); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 370 (6th Cir. 1998) (when evaluating administrative decisions, the courts of appeals review legal conclusions *de novo* but must affirm findings of fact and conclusions drawn therefrom if supported by substantial evidence). A decision based solely on Dr. Carroll's statements would not have had the support of substantial evidence in the record. True, Dr. Carroll said that he was confident that Mr. Janich's occupation and work did not cause his death, but the doctor also said in effect that he had no idea what work Mr. Janich had been performing in the days and weeks leading up to his death. Thus, this was not simply a problem of the doctor's indicating that he could rule out one cause of death while he remained unable to pinpoint a different cause. Deeper evidentiary flaws existed with Dr. Carroll's testimony, and since the employer came forth with nothing else that filled in the gaps, the ALJ was entitled to find that AGT did not introduce substantial evidence to rebut the § 20(a) presumption of coverage.

The only potential fly in this ointment is the possibility that the ALJ might have wrongly thought that the burden of persuasion shifted to the employer, not just a burden of production. While the record is not as clear as might be ideal, we believe that he did not make this mistake at the

critical time, nor did the BRB review the case on that erroneous legal assumption.

As we spelled out in some detail above, in his original opinion the ALJ articulated exactly the right set of standards for this case. He wrote that once the claimant establishes a *prima facie* case, the burden shifts to the employer "to go forward with countervailing evidence to rebut the presumption." He went on correctly to note that if the employer did so, "the presumption is rebutted, it drops from the case and the claim must be decided on the record as a whole." He then spoke of the employer's need to "*produce* specific and comprehensive evidence, not speculation, to overcome the presumption that working conditions caused the injury or death." (Emphasis added.) Thus, at the time he made the critical finding that the employer had failed to produce this type of evidence, there is nothing at all to criticize in his formulation of the governing legal standard.

Unfortunately, when the ALJ wrote his brief opinion on the motion for reconsideration, his language was contradictory. At one point he indicates that he "agree[s] with Employer that the presumption created by Section 20(a) is a 'bursting bubble' insofar as it drops from the case once it is rebutted." Only shifting burdens of production make bubbles burst in this sense, and thus the logic of that sentence does not suggest any error. A page later, however, he refers to a BRB decision, *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1994), which he said requires the burden of *proof* to shift to the employer—although that was dicta even in *Kubin*, because the evidence there too was speculative and equivocal. If by that reference the ALJ was shifting ground and implying that the burden of persuasion moved to the employer once the § 20(a) presumption is invoked, he was wrong. But the error, if any, was harmless. The ALJ had the right standard in mind when he assessed the employer's evidence in the original opinion. Last, we note that the BRB did not cite *Kubin* in its opinion, nor did it misstate the legal rule. To the

contrary, it too spoke of the employer's burden on rebuttal to "present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment." It then correctly stated that if the presumption was rebutted, the ALJ had to "weigh all of the evidence and resolve the causation issue based on the record as a whole."

IV

We are therefore satisfied that legal error did not infect the ALJ's findings about the quality of AGT's rebuttal evidence. We therefore AFFIRM the decision of the BRB awarding benefits to Mrs. Janich.

POSNER, *Chief Judge*, with whom Judges COFFEY, EASTERBROOK, and MANION join, dissenting. I agree that the burden of persuasion remains on the claimant, but I disagree that the administrative law judge was entitled to regard Dr. Carroll's evidence as too insubstantial to satisfy the employer's burden of production. The isolated passages that the administrative law judge and this court quote from Dr. Carroll's 72-page deposition give a misleading impression of the deposition as a whole. Carroll, a highly qualified cardiologist, opined that Janich had a type of heart condition, involving potentially fatal arrhythmias, that had caused his death, and that this type of arrhythmia (ventricular arrhythmia) is aggravated by neither mental stress nor physical exercise. He may be wrong, but neither the agency nor this court addresses that issue. The suggestion that Carroll's testimony lacked specificity or authority will not persuade anyone who has read his deposition carefully.

Dr. Carroll acknowledged that since there had been no autopsy and he had not been with Janich when he died, his opinion about the cause of Janich's death was inherently "speculative," a word that he was using not to denote the class of evidence that a tribunal might refuse to credit, but merely to acknowledge the limitations of medical science. Had he opined with greater definiteness, his opinion would have been suspect. Apparently no honest medical opinion in the employer's favor would carry any weight with this administrative law judge.

Bias to one side, in dismissing Carroll's evidence as "speculative" the administrative law judge may have committed the unpardonable sin against administrative law that we noted in *Peabody Coal Co. v. Director*, 165 F.3d 1126, 1128-29 (7th Cir. 1999): applying stricter standards of admissibility than the Federal Rules of Evidence, even though those rules, which are designed to prevent amateur factfinders (jurors) and generalist judges from going astray, are inapplicable to administrative agencies, which are supposed to have the kind of specialized knowledge that should enable them to consider evidence without wearing blinders.

Having acknowledged his inability to achieve metaphysical certainty, Dr. Carroll explained in great detail why he believed that it was indeed a ventricular arrhythmia—an arrhythmia which (and here he was emphatic) is not aggravated by mental or physical stress—that had caused Janich's death. If Carroll was right, Janich's death was completely unrelated to his employment; he would have died at the same instant had he retired six months earlier. Carroll may be wrong, but it is untenable to suggest that his evidence was not "substantial."

Much of the deposition consisted of the opposing lawyer's describing Janich's activities in the hours before his death in hypothetical terms and asking whether these activities could have caused Janich's sudden death. To each of these questions Carroll answered no; only to the

question whether Janich's working 244 hours over the course of the last 38 days of his life might have been a precipitating factor in his death did he answer "I don't know." This is the answer on which the administrative law judge and this court fasten. But the question had been interrupted by an objection to the inclusion in the question of the term "excessive hours" (which, oddly, does not appear in the transcript of the deposition), and it is likely that when Dr. Carroll said "I don't know" he was merely expressing an uncertainty about the question that had been engendered by the objection to the term "excessive hours." Since he testified repeatedly that stress and exercise were not precipitating factors in Janich's death, his "I don't know" can't be taken to be a considered response to the lawyer's hypothetical. It came moreover toward the end of the deposition and the lawyer had been bombarding him with lengthy hypotheticals for some time.

To trash his testimony on the basis of "speculative" and "I don't know" is the kind of tactic that agencies use only when they are determined to reach a preordained result willy-nilly. It is almost superfluous to add that the evidence of "stress" was extraordinarily thin. Janich worked 33 of the last 38 days of his life, which (given the total of 244 hours of work) averages out to 7.4 hours of work a day. Considering the essentially sedentary nature of his job, this was not a heavy workload, even if it did involve his working every other Saturday. Nor was his last day stressful. Janich sat in his office until someone told him to get a move on; then he and his gang stood by while members of a different union closed the hatches. Rain is an ordinary event in this occupation; and even if the other members of the gang were scurrying about, Janich wasn't. The most one can say is that he walked out of his office and yelled. Is that the kind of event that precipitates a heart attack? Maybe; but it is hardly such a powerful inference as to justify the administrative law judge in ignoring Dr. Carroll's contrary medical opinion completely.

I think that what led the administrative law judge and now this court astray is the counterintuitive character of that opinion. "Everyone knows" that stress can precipitate a heart attack, and "stress" is such a vague term that "everyone knows" that Janich must have been under stress. But the reason everyone thinks that stress can cause a heart attack is that when a lay person thinks of heart disease he invariably thinks of coronary artery disease, the narrowing of the arteries in the heart. Coronary artery disease, which can precipitate a heart attack through a sudden blockage of a coronary artery by depriving the heart muscle of the blood it needs, can be aggravated by stress; and Janich had severe coronary artery disease. But it is not the only type of heart disease. According to Carroll, Janich's death was precipitated not by a myocardial infarction (the type of heart attack produced by the blockage of a coronary artery) but by an irregularity in the beating of Janich's heart. The condition that produced this irregularity was related to his coronary heart disease, and specifically to his previous heart attack, but there is no argument that *this* condition, the precipitator (in Carroll's opinion) of the fatal heart attack, was worsened by any emotional or physical stress that Janich may have experienced on the day of his death or on the preceding 38 days. (I am assuming here that there was substantial evidence of stress; but there was not.) I do not find in either the agency opinions or this court's opinion any recognition of the distinction that I have been expounding, though it is the basis of Carroll's opinion.

If the Department of Labor is free to disregard medical evidence of the quality and specificity of Dr. Carroll's, it will have been empowered to read out of the statute the requirement that the worker's injury, to be compensable, have been employment-related. The case should be remanded to the Benefits Review Board with instructions to redetermine the claimant's entitlement to benefits in light of Dr. Carroll's substantial evidence to the contrary.

FLAUM, *Circuit Judge*, joined by MANION, *Circuit Judge*, dissenting. While I fully agree with the Majority's well reasoned analysis of the 20(a) presumption, I dissent from the result because I believe that affirming the ALJ's decision undermines the very approach announced today.

As the Majority explains, the 20(a) presumption is overcome by production, not persuasion. Once the employer produces substantial evidence suggesting that the employee's death was not work-related, coverage is no longer presumed but must be proved by the claimant based on a preponderance of the record evidence. Substantial evidence in this context refers to the minimum quantity of evidence which, if believed, could support a particular decision or finding. *See Steadman v. SEC*, 450 U.S. 91, 98 (1981); *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935). As the Majority notes, this standard has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *see Garvey Grain Co. v. Director, OWCP*, 639 F.2d 366, 370 (7th Cir. 1981) (per curiam) ("Substantial evidence must be enough to justify, if the trial were to a jury, a refusal to direct a verdict where the conclusion sought to be drawn from it is one of fact for the jury.").

Unfortunately, I believe the ALJ did not apply this approach or standard to Janich's case. The record strongly suggests that he shifted the burden of proof to the employer and required it to do much more than produce substantial evidence in rebutting the 20(a) presumption. The ALJ, relying on the BRB's decision in *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995), stated that, "Section 20(a), once invoked, shifts the burden of proof to the employer on the issue of causation such that the employer must prove that the disability (or death) was neither caused nor aggravated by the claimant's employment." Even if, as the Majority asserts, this statement is dicta, I do not share their confidence that the ALJ nonetheless "had the right standard in mind." On the contrary, the

ALJ's assessment of AGT's evidence supports the opposite conclusion.

The BRB affirmed the ALJ, stating that his opinion had "concluded that [Doctor Carroll's] testimony did not rebut the 20(a) presumption as his opinion was based on speculation and probabilities. . . . As the record supports the [ALJ's] conclusion that Dr. Carroll's opinion did not unequivocally rule out a connection between decedent's employment and his death, he did not err in finding it insufficient to rebut Section 20(a)."[1] However, as Chief Judge Posner explains, the fact that the doctor's conclusion was probabilistic and called for some degree of speculation did not make it insubstantial. More revealing is the BRB's statement that Dr. Carroll failed to rebut the presumption because he could not unequivocally rule out all work-related causes of death. This conclusion may have been appropriate for a party bearing the burden of proof, but not for a party whose only burden was to produce substantial evidence. The ALJ's statement only makes sense if he (mistakenly) believed that the employer retained the burden of proof on the question of causation and had to refute the presumption of coverage by at least a preponderance of the evidence.

Had the Majority's approach actually been followed, the ALJ would have eliminated the presumption and analyzed the case on the record as a whole, with the claimant bearing the ultimate burden of proof. This does not appear to have happened. Without necessarily accepting Judge Posner's view of the evidence's strength (nor the Majority's view of its weakness), I believe that Dr. Carroll's testimony was at least substantial. The doctor stated that due to the nature and history of Janich's heart problems, it was more likely than not that work played no role in

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[1] It should be emphasized that the doctor's testimony, which was credited by the ALJ, was not based on speculation, but on a review of the decedent's medical history and an understanding of Janich's duties.

his death. This is certainly "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson*, 402 U.S. at 401. Because AGT had produced "substantial evidence to the contrary," 33 U.S.C. §920(a), the ALJ should have extinguished the presumption of coverage at that point.

This is not to say that the ALJ's finding of coverage was ultimately incorrect. He may well have concluded that Mrs. Janich proved by a preponderance of the evidence that Mr. Janich's work was the most likely cause of his death. But because we cannot be sure what role the improperly retained presumption played in the decision, we should remand for reconsideration consistent with the clear approach the Majority outlines today. In attempting to save the ALJ's decision by claiming that he never shifted the burden of proof and only required the employer to produce substantial rebuttal evidence, the Majority runs the risk of either creating uncertainty about its approach in future cases or of establishing a far more demanding (and novel) version of the substantial evidence standard.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 96-1218

MARIAN JANICH (Widow of PAUL JANICH)	)	
Claimant-Respondent	)	
v.	)	
AMERICAN GRAIN TRIMMERS	)	DATE ISSUED: June 19, 1997
Self-Insured Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Claimant's and Employer's Motions for Reconsideration of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Robert T. Newman (Sweeney and Riman, Ltd.) Chicago, Illinois, for claimant.

Gregory P. Sujack and Kathleen M. Callahan (Garofalo, Hanson, Schreiber & Vandlik, Chtd.), Chicago, Illinois, for self-insured employer.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

DOLDER, Administrative Appeals Judge:

Employer appeals the Decision and Order and Decision and Order on Claimant's and Employer's Motion for Reconsideration (94-LHC-1922) of Administrative Law Judge Robert G. Mahony awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3).

Claimant is the widow of the decedent, Paul Janich. Decedent was employed by employer as a foreman or gang leader of a crew loading barges with grain. On the afternoon of August 12, 1992, a federal grain inspector ordered decedent to direct his crew to cease loading a barge due to the onset of heavy rain. Decedent left the office where he had been monitoring the loading and walked in the rain to the barge which was being loaded. After instructing the crew to cease loading and leave the barge, he sustained a fatal cardiac arrest. Claimant filed a claim for death benefits under the Act. 33 U.S.C. § 909. Employer controverted the issues of causation and average weekly wage; alternatively, employer sought Section 8(f) relief from continuing liability for death benefits. *See*, 33 U.S.C. § 908(f).

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. § 920(a), and that employer did not rebut the presumption. Claimant

was therefore awarded death benefits based on an average weekly wage of $296.92. Lastly, employer was found entitled to Section 8(f) relief based on decedent's pre-existing heart condition and diabetes mellitus. On reconsideration, the administrative law judge modified claimant's award to reflect an average weekly wage of $349.98.

On appeal, employer challenges the administrative law judge's finding that claimant established her *prima facie* case for invocation of the Section 20(a) presumption, and his finding that employer did not establish rebuttal of the presumption. Claimant responds, urging affirmance.

Employer initially contends that the administrative law judge erred in invoking the Section 20(a) presumption; specifically, employer argues that "[t]he medical evidence submitted by the Claimant did not meet the minimum standard necessary to establish with scientific certainty that the Decedent's heart attack arose out of and in the course of employment." *See* Employer's brief at 12. It is well-established that claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish a *prima facie* case. See *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981), *aff'd*, 687 F.2d 34, 15 BRBS 1 (CRT) (1994). Contrary to employer's contention, however, claimant is not required to introduce affirmative medical evidence proving that the working conditions in fact caused decedent's death; rather,

claimant must show only the existence of working conditions which could have conceivably caused decedent's death. *See generally U.S. Industries / Federal Sheet Metal, Inc.*, 455 U.S. at 608, 14 BRBS at 631. In this regard, the United States Court of Appeals for the Eighth Circuit has stated that the presumption clearly applies in cases where, as here, death occurs in the course of employment. *Bell Helicopter Int'l, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13 (CRT) (8th Cir. 1984); see *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (wherein the court stated that an injury need not involve an unusual strain or stress, and that it makes no difference that the injury might have occurred elsewhere).

In the instant case, it is uncontroverted that decedent sustained a fatal heart attack while working for employer; the administrative law judge stated the fact that a harm occurred is thus not in dispute. Employer contends that claimant failed to show that work activities could have aggravated decedent's pre-existing heart condition. However, it is undisputed that decedent, in the time immediately preceding his fatal heart attack, was instructed by a federal inspector to order his crew to cease loading a barge due to heavy rain, and that decedent walked to the barge which was then being loaded and instructed his crew to cease loading. The administrative law judge relied on these facts and explicitly credited Dr. Castor's opinion that either physical exertion (including walking and shouting),[1] or emotional stress could

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[1] The administrative law judge stated that decedent instructed his crew "perhaps by shouting." Employer challenges this in-

(continued...)

have precipitated decedent's death in finding that working conditions existed which could have caused decedent's death.[2] He also cited the Board's holding in *Cairns v. Matson Terminals*, 21 BRBS 252 (1988), that claimant is not required to show that decedent's working conditions were unusually stressful. Contrary to employer's assertion, the administrative law judge's finding that claimant established her *prima facie* case is supported by substantial evidence, including a medical opinion, and is consistent with law. Accordingly, we affirm the administrative law judge's invocation of the Section 20(a) presumption. See *Jacobs*, 746 F.2d at 1342, 17 BRBS at 13 (CRT); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Once the Section 20(a) presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial evidence. See *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Sam v. Loffland Bros.*, 19 BRBS 288 (1987). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. See *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.) *cert. denied*,

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[1] (...continued)
ference. We cannot, however, say it was unreasonable for the administrative law judge to consider the possibility that a man giving instruction from the dock, in a heavy downpour, to the crew on the boat might shout.

[2] The administrative law judge also credited evidence that decedent worked 29 to 33 of the 38 calendar days preceding his death and descriptions of decedent's job provided by co-workers. *See* Decision and Order at 6 n.1.

429 U.S. 820 (1976). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury or death nor aggravated the pre-existing condition resulting in injury or death. *See, e.g., Cairns*, 21 BRBS at 257. If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the records as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

In challenging the administrative law judge's findings on this issue, employer, citing the decision of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994), initially contends that the administrative law judge erred in requiring "specific and comprehensive" evidence to rebut the Section 20(a) presumption. We disagree. Contrary to employer's contention, the decision of the Supreme Court in *Greenwich Collieries* did not discuss or affect the law regarding rebuttal of the Section 20(a) presumption. *See Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995). Accordingly, we reject employer's assignment of error in this regard.

With regard to employer's assertion that the administrative law judge erred in finding that it failed to rebut the Section 20(a) presumption, we also affirm the administrative law judge. The administrative law judge's finding is supported by the record, as he rationally found the opinion of Dr. Carroll, upon whom employer relies in support of its contention, insufficient to rebut the presumption. Although the administrative law judge found Dr. Carroll to be a credible witness, he concluded that the

doctor's testimony did not rebut the Section 20(a) presumption as his opinion was based on speculation and probabilities. Specifically, the administrative law judge found that his opinion that decedent most likely died as a result of an arrhythmia was based on probability, *i.e.*, the 50 percent mortality rate of patients with poor left ventricular function and the fact that those patients who die "often" do so as a result of arrhythmia. *See* Decision and Order at 13. The administrative law judge noted that Dr. Carroll stated that "[because] there was no autopsy available, . . . to say exactly what the cause of death is is speculative at best," Carroll Deposition at 23, reasoning that, therefore, the conclusion that no causal relationship exists between decedent's death and his employment must also be speculative. In this regard, the administrative law judge also discussed Dr. Carroll's statement that he did not know if the cumulative effect of the amount of time decedent worked in the 38 days prior to his death could have been a precipitating factor. *Id.* at 61-62. Dr. Carroll also testified that he had no way of knowing the exact nature of decedent's activities on the day he died or the amount of physical stress on his job, but based his conclusions regarding work-relatedness on inferences drawn from the records provided him.[3] As the record

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[3] Dr. Carroll agreed with Dr. Castor, claimant's treating cardiologist, that claimant most likely died of sudden cardiac death. Both doctors were asked hypotheticals in their testimony about the likelihood of work-relatedness based on stated facts about decedent's activities on the day of his death. Employer's attorney described the events testified to by Mr. Castillo, a coworker of decedent, as involving decedent's being in the office

(continued...)

supports the administrative law judge's conclusion that Dr. Carroll's opinion did not unequivocally rule out a connection between decedent's employment and his death, he did not err in finding it insufficient to rebut Section 20(a).

Moreover, there is no other opinion sufficient to do so. The administrative law judge found that Dr. Castor's opinion that decedent died of sudden cardiac death also

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[3] (...continued)
for about an hour prior to death and then coming out of the office with another man to stop the loading of the barge. In response to the question whether anything in the activities described by Mr. Castillo was "strenuous or stressful or likely to induce sudden cardiac death or cardiac arrhythmias," Dr. Carroll stated that since he was unfamiliar with "exactly what that activity entails, the best answer I can give is . . . there did not seem to be anything in there that would precipitate an arrhythmia, but I have to say that I am unfamiliar with that activity specifically and I wasn't there at the time that it was performed, but from the report that you read there doesn't seem to be anything in there that would suggest that." Carroll Deposition at 27-28. Dr. Castor's opinion is similarly qualified, as he testified in response to claimant's attorney hypothetical that "there's a lot of assumption on all those activities that this hypothetical man was doing. I think that it's just reasonable to say that if you have a heart condition and if you're doing a lot of strenuous exertion, there's the possibility that you can aggravate your heart condition." Castor Deposition at 27. With regard to descriptions of decedent as walking or shouting, he stated it would depend on how fast he was walking and how loud he was shouting. *Id.* at 58. In effect, since neither doctor knew how strenuous claimant's work was on the day in question, neither could give an unequivocal opinion. Under these circumstances, the administrative law judge did not err in finding Section 20(a) controlling.

could not rebut Section 20(a) as Dr. Castor stated that decedent was susceptible to sudden cardiac death upon physical exertion or emotional stress. The administrative law judge properly found that this opinion did not sever the causal chain and thus did not rebut Section 20(a). Moreover, the administrative law judge also credited Dr. Castor's opinion that decedent's death could have been aggravated by his working conditions in conjunction with the testimony of co-workers regarding decedent's job responsibilities in general and working conditions on the day of his death.[4] He thus found causation established.

In this case, the administrative law judge thoroughly considered the evidence, and under our statutory standard of review, 33 U.S.C. § 921(b)(3), we must affirm his decision if it is supported by substantial evidence and in accordance with law. We conclude that the administrative law judge properly applied the Section 20(a) presumption and the aggravation rule, holding that if working conditions played a role in decedent's death, it was compensable. As neither the opinion of Dr. Carroll nor any other medical evidence establishes that decedent's working conditions played no role in his death at work in August 1992, Section 20(a) is not rebutted. We thus affirm the administrative law judge's finding that decedent's death was causally related to his employment, and his consequent award of death benefits to claimant.

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[4] The administrative law judge also gave little weight to the opinion of Dr. Greenberg, who stated decedent's occupation was a direct causative factor in his death, due to the absence of his qualifications from the record.

Accordingly, the Decision and Order and Decision and Order on Claimant's and Employer's Motions for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

I concur.

REGINA C. McGRANERY
Administrative Appeals Judge

BROWN, Administrative Appeals Judge concurring:

I concur in the result reached by my colleagues in this case.

JAMES F. BROWN
Administrative Appeals Judge

[Dated May 2, 1996]

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

In the Matter of	)	
	)	
Marian Janich	)	
	)	
Claimant	)	Case No. 94 LHC 1922
	)	
v.	)	
	)	OWCP No. 10-32147
American Grain Trimmers	)	
	)	
Employer	)	
	)	
and	)	
	)	
Director, Office of Workers' Compensation Programs	)	
	)	
Party-In-Interest	)	

DECISION AND ORDER ON CLAIMANT'S AND EMPLOYER'S MOTIONS FOR RECONSIDERATION

This matter arises from a claim for death benefits under the Longshore and Harbor Workers' Compensation Act, as amended 33 U.S.C. § 901 *et seq.*, hereinafter referred to as "the Act." On March 1, 1996, I issued a Decision and Order awarding Claimant, Marian Janich, benefits on account of her husband, Paul Janich's death. Specifically, I found that neither the opinions of Dr. Carroll and Dr. Castor, nor any other evidence is suffi-

cient to rebut the Section 20 presumption that Decedent's death arose out of his employment. In finding the claim compensable, I credited Dr. Castor's opinion that Decedent's death could have been aggravated by his working conditions in conjunction with the testimony of three witnesses regarding Decedent's job responsibilities in general and work conditions on the day of his death. In determining the amount of benefits payable to claimant, I accepted Claimant's argument that Decedent's average weekly wage prior to his death was $296.92 and pursuant to section 9 of the Act, awarded Claimant benefits in the amount of 50% of Decedent's average weekly wage, or $148.46.

On March 22, 1996, Claimant filed a Motion for Reconsideration on the grounds that under the Act, Decedent's average weekly wage shall not be less than the national average weekly wage which was $349.98 at the time of his death. By letter dated April 2, 1996, Employer advised that it has no objection to Claimant's request for reconsideration. On March 28, 1996, Employer filed a Motion for Reconsideration on the grounds that I applied the incorrect legal standard in determining that Employer failed to rebut the presumption that Decedent's death was causally related to his employment. In a Reply to Employer's Motion for Reconsideration filed on April 17, 1996, Claimant argues that Dr. Castor's opinion supports a finding that the claim is compensable and Dr. Carroll's opinion is not specific and comprehensive; Claimant does not address Employer's argument that the incorrect legal standard was applied in determining whether Employer rebutted the Section 20(a) presumption.

Claimant's Motion for Reconsideration

I grant Claimant's request for reconsideration of the death benefit rate awarded in my previous Decision and Order. I awarded Claimant benefits in the amount of $148.46 which is 50% of Decedent's average weekly wage of $296.92. As counsel for Claimant points out in his Motion for Reconsideration, Section 9(e) of the Act states that in computing death benefits, the average weekly wage of the deceased shall not be less than the national average weekly wage as determined by the Secretary of Labor. 33 U.S.C. §§ 909(e), 906(b)(3). At the time of Decedent's death on August 12, 1992, the national average weekly wage was $349.98. Therefore, Claimant should have been awarded benefits at the rate of $174.99 per week.

Employer's Motion for Reconsideration

Employer argues that I "improperly required it to present more evidence to rebut the § 20(a) presumption than is required under the act or the applicable case law" by requiring it to produce "specific and comprehensive evidence" to rebut the presumption. Further, citing *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251 (1994). Employer argues that once it produces evidence contrary to the presumed fact, the presumption falls out of the case, and the employee has the burden of proving that his claim is compensable. Citing the evidentiary rules set forth at 29 C.F.R. Part 18, and its counterpart, Rule 301 of the Federal Rules of Evidence as well as the cases interpreting Rule 301, Employer maintains that "[t]he presumption compels the production of a mini-

mum quantum of evidence from the party against whom it operates, nothing more." Finally, Employer contends that Dr. Carroll's and Dr. Castor's reports and testimony amount to the requisite "scintilla of evidence in opposition to the presumption of causation" and that I should not have weighed or assigned credit to the evidence in determining whether it was sufficient to rebut the presumption.[1]

First, I note that the rules of evidence set forth at 29 C.F.R. Part 18 expressly provide that they are inapplicable, with certain exceptions not relevant here, to proceedings under the Longshore and Harbor Workers' Compensation Act. 20 C.F.R. § 18.1101. Therefore, Employer's references to case law interpretations of Rule 301 are not necessarily on point and accordingly, are not addressed here.[2]

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[1] Employer incorrectly refers to the Section 20 presumption as one of compensability. Section 20(a) states:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary –
>
> (a) That the claim comes within the provisions of this Act

33 U.S.C. § 920(a).

[2] I agree with Employer that the presumption created by Section 20(a) is a "bursting bubble" insofar as it drops from the case once it is rebutted. *DelVecchio v. Bowers*, 296 U.S. 280 (1935), *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). However, the fact that the presumption drops from the case once it is rebutted does not affect the question of whether the evidence is sufficient to rebut the presumption, which is the issue here.

Second, I reject Employer's argument that *Greenwich Collieries* stands for the proposition that the Section 20(a) presumption drops out of the case once Employer produces contrary evidence. In *Greenwich Collieries*, the Supreme Court invalidated the "true doubt rule" reasoning that the burden of persuasion remains on the claimant pursuant to Section 7 of the Administrative Procedure Act, and therefore the claimant must present a preponderance of evidence in order to prevail in his claim. In *Holmes v. Universal Maritime Service Corp.*, the Benefits Review Board recently addressed the question of whether the court's decision in *Greenwich Collieries* did not discuss or affect the law regulating the invocation and rebuttal of the Section 20(a) presumption, the Board held:

> As an employer may rebut the Section 20(a) presumption only upon the production of *specific and comprehensive* evidence serving the presumed causal connection, its burden is unchanged by the decision in *Greenwich Collieries*.

Holmes v. Universal Maritime Service Corp., 29 BRBS 18 (1995) (emphasis added).

I also reject Employer's argument that its burden on rebuttal requires a minimum quantum of evidence in opposition to the presumption, and that the fact-finder must not weigh or assign credit to the evidence. While Employer concedes that the Act requires it to submit "substantial evidence to the contrary" in order to rebut the presumption, Employer maintains that I should have analyzed its rebuttal evidence in a light most favorable to Employer, and further, that I should not have required it to produce specific and comprehensive evidence. Es-

sentially, Employer argues that the presumption is rebutted by the production of contrary evidence, regardless of its veracity or weight.

While presumptions which have been created by courts in other legal contexts, such as Title VII, may be rebutted merely by the production of contrary evidence, *see, e.g. St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742 (1993), the Section 20(a) presumption is a *statutory* presumption which by its express terms requires the production of substantial evidence in order to rebut it. In numerous cases, the Benefits Review Board has addressed the question of whether an employer's evidence is sufficient to meet the statutory burden; in so doing, the Board has repeatedly articulated Employer's evidentiary burden on rebuttal as one which requires the production of "specific and comprehensive evidence."[3] *See, e.g. Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075 (D.C.Cir. 1976), *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995), *Fortier v. General Dynamics Corp.*, 15 BRBS 4 (1982), *Neeley v. Newport News Shipbuilding and Dry Dock Co.*, 19 BRBS 138 (1986). Most recently in *Kubin v. Pro-Football Inc.*, 29 BRBS 117 (1995), the Benefits Review Board held that Section 20(a), once invoked, shifts the burden of *proof* to employer on the issue of causation such that employer must prove that the disability (or death) was neither caused nor aggravated by the claimant's employment. The Board explicitly rejected the em-

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[3] In order to determine whether the rebuttal evidence is specific and comprehensive, the administrative law judge must assess the evidence and make credibility determinations with regard to it.

ployer's argument that the burden of proof remained with the claimant on the issue of causation after the Section 20(a) presumption had been invoked. Moreover, the Board held that a physician's opinion which was unclear as to the exact cause of the disability is not sufficiently specific to rebut the Section 20(a) presumption. Rather, the Board characterized it as a speculative and equivocal opinion. Therefore, Employer's arguments that I misconstrued its evidentiary burden on rebuttal are clearly misplaced.

In evaluating Employer's evidence on rebuttal in my prior Decision and Order, I found that neither Dr. Carroll's nor Dr. Castor's opinions sustained Employer's burden. More specifically, I found Dr. Carroll's opinion that Decedent died as a result of sudden cardiac death unrelated to his employment to be insufficient in part because he testified that "to say exactly what the cause of death is is speculative at best." I also found that while Dr. Castor opined that Decedent was a candidate for sudden cardiac death, he also testified that Decedent was susceptible to sudden cardiac death *upon* physical exertion or emotional stress. I interpreted this testimony to mean that sudden cardiac death in Dr. Castor's view could have been related to Decedent's working conditions. Accordingly, I found – and presently reaffirm – that Dr. Carroll's and Dr. Castor's opinions considered separately or together, fail to rebut the presumption that Decedent's death was causally related to his employment.

In summary, upon reconsideration, I reject Employer's arguments that I applied an incorrect legal standard in determining whether it rebutted the Section 20(a) pre-

sumption of causation. Therefore, I reaffirm my finding that Decedent's death arose out of and in the course of his employment.

Accordingly, the Decision and Order issued March 1, 1996 is hereby amended as follows:

ORDER

1. Employer, American Grain Trimmers, shall pay to Claimant, Marian Janich, death benefits in the amount of $174.99 per week for a period of 104 weeks commencing August 12, 1992. Thereafter, benefits shall be payable by the Special Fund.

2. Employer's Motion for Reconsideration is DENIED.

/s/ Robert G. Mahony
ROBERT G. MAHONY
Administrative Law Judge

Date Issued: May 2, 1996
Washington, D.C.
RGM/krt

[Dated March 1, 1996]

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

In the Matter of	)	
	)	
Marian Janich	)	
	)	
Claimant	)	Case No. 94 LHC 1922
	)	
v.	)	
	)	OWCP No. 10-32147
American Grain Trimmers	)	
	)	
Employer	)	
	)	
And	)	
	)	
Director, Office of Workers' Compensation Programs	)	
	)	
Party-In-Interest	)	

DECISION AND ORDER

This claim for death benefits arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. Section 901 *et seq.*, hereinafter referred to as "the Act." Death benefits are payable to the deceased employee's surviving spouse in the amount of 50 per centum of the decedent's average wages and reasonable funeral expenses not exceeding $3,000. 33 U.S.C. Section 909. In establishing entitlement to death benefits, Claim-

ant has available the statutory presumptions at 33 U.S.C. Section 920. Nonetheless, the burden of persuasion on all issues with respect to entitlement to benefits remains with Claimant under Section 7(c) of the Administrative Procedure Act. Director, *OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 2259 (1994).

A hearing was held in Chicago, Illinois, on November 1, 1994, at which time the parties were given the opportunity to adduce testimony, offer documentary evidence, and present oral argument. Claimant's exhibits 1-4 and 9-19 and Employer's exhibit 1 were received in evidence at the hearing. Pursuant to provisions made at the hearing and thereafter, the record remained open for the submission of additional evidence and post-hearing briefs. Claimant submitted the depositions of Dr. Conrado Castor and Mr. Antonio Castillo (Claimant's exhibits 20 and 21), and Employer submitted the deposition of Dr. Richard J. Carroll (Employer's exhibit 2) which are admitted into evidence. By letter dated January 31, 1996, Employer submitted an Application for Relief under Section 8(f) of the Act. Claimant and Employer submitted post-hearing briefs on April 28, 1995 and January 31, 1996, respectively.

Outstanding Motions

Following the deposition of Dr. Castor taken on February 22, 1995, Employer filed a motion to strike Claimant's exhibit 18, an opinion letter dated October 26, 1994, from Dr. Castor to Claimant's counsel. At his deposition, Dr. Castor produced a letter from Claimant's counsel requesting that he "provide a statement or opinion to the

effect of showing an agreement with Dr. Greenberg?" Dr. Greenberg provided an opinion favorable to Claimant's case. Employer argues that Dr. Castor's opinion letter should be stricken from the record because the "opinions expressed by Dr. Castor are based on improperly phrased questions." In his response to the motion to strike, Claimant argues that Dr. Castor's letter is admissible because he is not biased nor interested in the claim, Employer has had an opportunity to cross-examine him, and the records are not inconsistent on their face. Additionally, Claimant contends that the question posed in counsel's letter was not improper, did not prejudice the doctor, and did not undermine the integrity of the proceeding.

I sustain Employer's objection. Counsel's letter to Dr. Castor requesting that he agree with Dr. Greenberg's report is an attempt to bolster Dr. Greenberg's report. The motion to strike is granted.

On April 28, 1995, Claimant filed a motion to admit into evidence copies of articles from two medical journals, a passage from a textbook on heart disease, and excerpts from a popular book on health, designated Claimant's exhibits 22-25. Claimant contends that these exhibits should be admitted because they are relevant, material, reliable, and not repetitive. In addition, Claimant contends that the materials were "used or referred to in various ways, during the deposition of Dr. Carroll," and therefore may be useful in evaluating his testimony and report. Employer opposes the submission of the articles and texts on the grounds that no expert has established that they are learned or authoritative treatises. Furthermore, Employer disputes Claimant's implication that Dr.

Carroll's testimony on deposition establishes the texts as authoritative.

I sustain Employer's objections to Claimant's exhibits 22-25. First, as I read Dr. Carroll's deposition testimony, he did not "use or refer" to the materials; rather, Counsel for Claimant used and referred to the materials as a tool for his cross-examination of Dr. Carroll. Dr. Carroll expressly stated that he could not render an opinion on the materials since he had not read them. Moreover, these materials are not helpful in resolving the issue in this case, namely, whether the deceased employee's fatal cardiac arrest was causally related to his employment; accordingly, they are not relevant to this proceeding.

Employer's unopposed motion to correct the transcript of the hearing is granted.

Stipulations

The parties have stipulated, and I find:

1. The Act applies.
2. The date of injury is August 12, 1992.
3. All required notices were given in a timely fashion.

Statement of the Case

Decedent, Paul Janich, was born on June 12, 1926, and worked as a grain trimmer for Employer, American Grain Trimmers for approximately 40 years. Decedent was a foreman for approximately 38 years. On August 12,

1992, at the age of 66, Decedent suffered a fatal cardiac arrest at work. Claimant, Marian Janich, is Decedent's widow. She has not remarried and seeks statutory benefits, alleging that her husband's death arose out of and in the course of his employment.

Both Employer and Director contend that Decedent's work neither caused nor aggravated nor contributed to his death in any way and therefore, Claimant is not entitled to a widow's death benefit. Alternatively, Employer argues that if Decedent's death is compensable, then Employer is entitled to Special Fund relief pursuant to Section 8(f) of the Act on account of his preexisting permanent disability. Director agrees.

Summary of Evidence

At the hearing, testimony was received from Marian Janich, John Janich, Decedent's brother and fellow grain trimmer, and Jesse Herrera, a grain trimmer who worked under Decedent on the day of his death. Antonio Castillo, a grain trimmer who also worked under Decedent on the day of his death, testified by deposition. Each of these witnesses testified as to the job responsibilities of a grain trimmer and a foreman for grain trimmers, also referred to in the record as a "gang leader".

The grain trimmers' job is to assist in loading grain onto barges. Between 1,100 and 1,500 tons of grain are loaded onto a typical barge. Generally, three grain trimmers board the barge, two of whom direct the flow of the grain by pulling ropes attached to the spout, and one of whom signals the spout operator. The foreman's job is to ensure that after all of the grain has been loaded, the

barge is balanced and the depth of its keel below the water line does not exceed the draft limitations set according to its destination.

When loading a barge, the foreman begins by determining how much grain to load and which area of the barge to load first. The foreman then instructs the elevator workers to load most of the grain, reserving a fraction of the ship's capacity. When the loading begins, the foreman monitors the process from an office where he can hear through a radio how much grain is being loaded. Before the end of the first load (the "hold-off point"), the foreman goes onto the dock and walks along the barge to check its list and trim. Then the foreman checks the draft by looking at the draft marks which are painted in one foot increments on the side of the barge. Sometimes he reads the draft by lying down on the dock and looking over the side. Once the foreman has checked the draft he determines how much of the remaining grain to load and where it should be loaded. Depending on how many spouts there are, the foreman will sometimes direct that the barge be repositioned along the dock before loading the remaining grain.

Determining the draft is an integral part of the foreman's job since it is his responsibility to see that the barge is filled with grain as close to capacity as possible without exceeding the draft limitations, presumably to make the most efficient use of the barge. If, after the barge is loaded, it is over the draft, then grain must be discharged before the vessel is permitted to leave the port.

The foreman's job also includes providing occasional assistance to the grain trimmers by pulling the spout and

ensuring that no one is ever over an open hatch or in an area where one might slip on the grain. In addition, John Janich testified that when there were "lines jobs," Decedent would be the one who "stood up at night and called the linesmen out . . . to tie the vessel up" and keep track of it.

Decedent also made sure that enough union members showed up for available lines jobs and grain trimmer jobs, arranging for replacement workers if necessary. Claimant testified that her husband had a difficult time finding men to tie up ships. It is not clear whether the Decedent's job required him to perform this function. However, when Decedent served as president and secretary of the union, it was one of his concerns to make sure enough union members showed up for available jobs. According to his brother, even when Decedent did not hold a union position, as was the case just prior to his death, he took responsibility for this task nonetheless.

Marian Janich, John Janich, and Antonio Castillo testified that Decedent enjoyed his work as a foreman for the grain trimmers and was very conscientious in carrying out his responsibilities. John Janich and Antonio Castillo also testified that Decedent had a good working relationship with other employees.

John Janich testified that the job required attention and concentration. Antonio Castillo testified that the job of a grain trimmer is not difficult because "we know what we're doing there." Castillo also testified that all of the foremen "have problems" on the job, "especially if the barge has water," and that the foremen have to be "very careful which way [the barge] is listed." During the initial loading of the grain, however, Castillo explained

that there's nothing to do but "watch the grain [and] keep the list on the barge."

The job of a grain trimmer is seasonal, with July and August being the busiest months of the season. Castillo testified that the summer of 1992 was a relatively busy season for grain trimmers in Chicago. John Janich testified that the Decedent always worked the most because he was one of the top ranking workers in the union for seniority. Decedent, having been hospitalized in November of 1991, did not return to work until July 6, 1992. From July 6, 1992 until the date of his death on August 12, 1992, Decedent worked between 29 days (217.5 hours) and 33 days (258.5 hours).[1]

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[1] Claimant contends that her husband worked 33 of the 38 days prior to his death and introduced in evidence letters from American Grain Trimmers and Rogers Terminal and Shipping, as well as an earnings record allegedly from Cargill Marine and Terminal, suggesting that Decedent worked for three separate employers. The letters from American Grain Trimmers and Rogers Terminal specify the particular days worked by the Decedent in 1992 for a total of 29 days. In contrast, the earnings record allegedly from Cargill Marine and Terminal indicates only how much Decedent was paid for four pay periods between July and August of 1992. No employer is identified on the face of the earnings statement. Because the letter from Rogers Terminal and Shipping notes that it is a division of Cargill Marine and Terminal, coupled with the evidence of Decedent's W-2 forms for 1991 indicating that he worked for only two employers: American Grain Trimmers and Rogers Terminal and Shipping, it is not clear that Decedent worked for three separate employers during July and August of 1992. Thus, it appears more likely than not that the earnings record is merely duplicate evidence of the nine days Decedent worked at Rogers Terminal and Shipping, rather than evidence of an additional four days of work.

Claimant testified that the day before her husband died, he returned home after work sometime between 3:00 and 4:00 p.m., and told her that he was tired. The next morning the Decedent woke up at approximately 7:00 a.m. and started work at 8:00 a.m.; it was raining intermittently. Before breaking for lunch at noon, the crew finished loading one barge. After lunch, at 12:30 p.m., the crew began loading a second barge; Decedent was monitoring the loading from the office. At approximately 1:30 p.m., when it began raining heavily, Decedent and the Department of Agriculture inspector came out of the office and ordered the grain trimmers and the elevator workers to stop loading the barge in order to protect the grain from getting wet. Decedent instructed the grain trimmers to leave the barge so that the elevator workers could close the hatches. While he stood on the dock watching the elevator men close the barge, Decedent collapsed and did not regain consciousness. At 2:18 p.m., he was pronounced dead upon arrival at the South Chicago Community Hospital.

Decedent's Medical History

Dr. Conrado Castor, Decedent's treating cardiologist, and Dr. Richard Carroll, a consulting cardiologist for the Employer, testified by deposition. Additionally, Dr. Carroll provided a report based on his review of Decedent's medical records. On behalf of Claimant, Dr. Nathaniel Greenberg provided a report which includes a summary of the Decedent's medical history and an opinion as to the cause of his death. Dr. Castor's office notes were submitted by Employer as part of its application for Section 8(f) relief.

Decedent's cardiac problems first surfaced in 1980 when he underwent an evaluation for chest pain. An EKG showed an inferior wall myocardial infarction of an undetermined age and a stress test was positive for heart disease; both his father and his brother died from heart problems at the ages of 56 and 34, respectively.

In 1981, Dr. Conrado Castor, board certified in internal medicine and cardiovascular disease, began treating Decedent for recuperation from his myocardial infarction ("MI"). At the time, Dr. Castor's impression was that Decedent had arteriosclerosis based on his age and the MI. Decedent, however, declined an angiogram, a diagnostic procedure which would have provided Dr. Castor with a clearer picture of Decedent's cardiovascular condition.

In April of 1981, Decedent was diagnosed with ventricular arrhythmia, defined by Dr. Castor as "heart irregularities caused by problems with the electrical conduction of impulse on the heart muscle." Dr. Castor treated the condition with Quinaglute, an antiarrhythmic drug. Although Dr. Castor was not sure Decedent still had arrhythmia, he continued Decedent on Quinaglute in order to maintain his condition. According to Dr. Castor, Decedent was "doing well" from 1981 until 1987, although his condition was closely monitored.

In 1987, Decedent developed intermittent claudication, a deficiency in the blood flow to the leg muscles due to the obstruction of the arteries supplying those muscles. A Doppler examination of Decedent's lower extremities revealed stenosis of the superficial artery and probable total occlusion of the left anterior tibial arteries.

In 1990 Decedent was diagnosed with diabetes mellitus. Dr. Castor treated the Decedent for this condition with an oral hypoglycemic drug.

In November of 1991, Decedent was hospitalized for almost two weeks. On admission he was diagnosed with mycoplasma bronchitis with chronic obstructive pulmonary disease. While hospitalized, Decedent's cardiac condition was also evaluated; he was diagnosed with congestive heart failure, dilated cardiomyopathy, and arrhythmia. Dr. Castor explained on deposition that a diagnosis of dilated cardiomyopathy indicates a dilated, enlarged, and weak heart. A MUGA scan revealed bilateral ventricular dysfunction; Decedent had a left ventricular ejection fraction of 17% and a right ventricular ejection fracture of 27%. The recommended range for ventricular ejection fractions is between 50% and 80%.

Dr. Castor followed Decedent's condition after he was discharged from the hospital. In March of 1992, Decedent's MUGA scan showed improvement in his ventricular ejection fraction, though with a left ventricular ejection fraction of 24% and a right ventricular ejection fraction of 22%, the test results were still well below normal.

In May of 1992, Dr. Castor examined Decedent and found his cardiac condition stable insofar as he had no heart failure, arrhythmia, shortness of breath, angina, or chest pain at the time of the exam. On the other hand, Dr. Castor explained that his characterization of Decedent's condition as "stable" does not indicate that Decedent had returned to good health. Rather, it means only that there was no acute condition present upon examination.

Cause of Death

Although Dr. Castor had agreed to sign the death certificate, his associate Dr. Joseph Chan signed it instead. Dr. Chan identified the cause of death as cardiopulmonary arrest due to dilated cardiomyopathy and diabetes mellitus.

At the request of Claimant's counsel, Dr. Nathaniel Greenberg provided a report, dated April 27, 1994, on the cause of Decedent's death. There is no evidence in the record as to Dr. Greenberg's qualifications or credentials.

Dr. Greenberg concluded that Decedent's death was causally related to his work. The cause of death, according to Dr. Greenberg, was most likely "ventricular fibrillation which may or may not be a product of an acute myocardial infarction." Dr. Greenberg elaborated:

> With this man's serious pre-existing heart disease, coupled with the long hours of almost daily work from July 6 on plus the stresses of the last day of his life, it is likely that a fatal heart rhythm abnormality was precipitated. The diseased heart is always hyperirritable. When tension and anxiety are superimposed upon the pre-existing heart disease, the likelihood of a serious or even lethal heart rhythm disturbance is considerably increased. I believe that was the situation with Mr. Janich. Therefore, his occupation was a direct causative factor in his death.

Dr. Castor, Decedent's treating cardiologist, testified by deposition. The cause of Decedent's death, he explained, was poor ventricular function. Dr. Castor stated that while he does not know whether Decedent suffered sudden cardiac death, he was a candidate for it based on his cardiac condition alone; and, moreover, Decedent was

susceptible to sudden cardiac death upon physical exertion or emotional stress. Dr. Castor opined that shouting or walking could constitute strenuous physical exertion depending upon the circumstances, such as the pace at which he was walking. According to Dr. Castor, sudden cardiac death can result from either poor ventricular function or arrhythmias.

On behalf of Employer, Dr. Richard J. Carroll reviewed Decedent's medical records and written statements by Antonio Castillo and Decedent's brother, Mike Janich, regarding Decedent's work activities on the day he died and his job in general. Dr. Carroll is board certified in internal medicine and cardiology.

In a report dated September 7, 1994, Dr. Carroll concluded that "the reason Mr. Janich died was most likely from sudden cardiac death, probably initiated by a lethal cardiac arrhythmia."[2] According to Dr. Carroll, an arrhythmia occurred as a result of Decedent's severe level of left ventricular dysfunction, which in turn was due to the risk factors he had—positive family history for heart disease, diabetes mellitus, and a smoking history. In support of his contention that Decedent's sudden death was precipitated by an arrhythmia, Dr. Carroll stated that arrhythmia is the most common cause of death among patients who have poor left ventricular function.

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[2] Dr. Carroll defined sudden cardiac death as

> basically a phenomenon where there's no obvious precipitating event such as a car accident or an acute infarct and the patient is from a relative state of wellness and suddenly dies without obvious precipitating cause.

(Carroll Dep. at 23.)

More specifically, Dr. Carroll explained that Decedent's MUGA scan and his objective symptoms upon admission to the hospital in November 1991 indicate that he was in Class III-IV heart failure for which the mortality rate is 50%. Moreover, Dr. Carroll opined that the 50% of patients who die within two years "often" do so because of an arrhythmia.

Dr. Carroll emphatically disagrees with Dr. Greenberg's conclusion that "when tension and anxiety are superimposed upon the pre-existing heart disease, the likelihood of a serious or even lethal heart rhythm disturbance is increased." Rather, Dr. Carroll maintains that there has been no study "that has been able to correlate mental stress and anxiety with the development of arrhythmias." Thus, Dr. Carroll concluded that there is no evidence that Decedent's "occupation in any way caused or aggravated the situation leading to his death."

Dr. Carroll also testified by deposition. He stated that he agreed with Dr. Castor's diagnosis of dilated cardiomyopathy and went on to opine that people with dilated cardiomyopathy have severe left ventricular dysfunction and often congestive heart failure and arrhythmias as well. According to Dr. Carroll, the most likely cause of Decedent's left ventricular dysfunction was coronary artery disease; however, he explained that a diagnosis could only be inferred from Decedent's medical history and records because neither an angiogram nor an autopsy was performed.

In addition, Dr. Carroll reiterated his conclusion that Decedent's death was "most likely" due to sudden cardiac death, based on the fact that Decedent had poor left ventricular function, a number of risk factors for coro-

nary artery disease, an old myocardial infarction by EKG, a history of arrhythmias, in addition to the fact that Decedent's death had the appearance of sudden death given that he collapsed. Yet Dr. Carroll also testified that because no autopsy was performed, "to say exactly what the cause of death is is speculative at best."

Dr. Carroll testified further that Decedent's work activities in general, and in the hour before his death in particular, would not have precipitated either an arrhythmia or sudden cardiac death. Moreover, Dr. Carroll testified that if he had a patient with Decedent's medical history, he would not restrict his work activities, suggesting that Decedent's job activities neither aggravated nor caused his death. However, Dr. Carroll also testified that he did not know if the cumulative effect of working 33 out of the 38 days prior to Decedent's death could have been a precipitating factor in his death.

Discussion

Pursuant to Section 9 of the Act, death benefits are payable to the eligible survivors of an employee whose death is the result of a work place injury. Section 20(a) of the Act presumes, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the Act. In order for the presumption to apply, Claimant must establish a *prima facie* case by showing that the deceased employee suffered a harm and that a work-related accident occurred or that conditions existed which could have caused the harm. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once Claimant establishes a *prima facie* case, the burden shifts to Em-

ployer to go forward with countervailing evidence to rebut the presumption that Decedent's death was caused or aggravated by his employment. If the presumption is rebutted, it drops from the case and the claim must be decided on the record as a whole.

It is undisputed that a harm occurred when Decedent collapsed and died as a result of a cardiac arrest. Furthermore, crediting Dr. Castor's opinion that either physical exertion (including walking and shouting), or emotional stress could have precipitated Decedent's death, I find that working conditions existed which could have caused Decedent's heart attack. In the moments before his death, Decedent left the office and walked out to the barge and instructed, perhaps by shouting, the grain trimmers to stop loading the barge because it was raining heavily. While this may not constitute extreme physical exertion or emotional stress, Claimant is not required to show that Decedent's work conditions were unusually stressful. *Cairns v. Matson Terminals*, 21 BRBS 252 (1988). Accordingly, I find that Claimant has established a *prima facie* case.

Employer must produce specific and comprehensive evidence, not speculation, to overcome the presumption that working conditions caused the injury or death. Death occurring during the course of employment strengthens the presumption that it arose out of employment. In cases where there is an underlying condition, such as Decedent's heart disease, the fact that Decedent could have had a fatal cardiac arrest anywhere does not rebut the presumption. Rather, under the aggravation rule, if Decedent's work played a role in his death, the entire

resultant disability is compensable. *Cairns v. Matson Terminals*, 21 BRBS 252 (1988).

I find that Employer has not sustained its burden. While I find Dr. Carroll to be a credible witness, his opinion falls short of meeting Employer's burden on rebuttal because it is based on probability and speculation. Since Dr. Carroll stated that "to say exactly what the cause of death is is speculative at best," his conclusion that no causal relationship exists between Decedent's death and his employment must also be speculative. Similarly, Dr. Carroll's opinion that Decedent most likely died as a result of an arrhythmia is based largely on probabilities: the 50% mortality rate of patients with poor left ventricular function and the fact that those patients who die do so "often" as a result of arrhythmia. Moreover, Dr. Carroll's conclusion that Decedent's death was unrelated to his work is undermined by his concession that he does not know if the cumulative effect of the amount Decedent worked in the 38 days prior to his death could have been a precipitating cause of death.

Nor does Dr. Castor's suggestion that Decedent died of sudden cardiac death serve to break the causal connection between Decedent's death and his employment since Dr. Castor also stated that Decedent was susceptible to sudden cardiac death upon physical exertion or emotional stress. Where working conditions could have caused the harm, the question is not whether there is evidence of a causal relationship between Decedent's death and his employment, but rather, whether there is substantial evidence to the contrary. I conclude that there is not. Thus, the evidence is insufficient to rebut the presump-

tion that Decedent's death arose out of and in the course of his employment.

In finding this claim compensable, I credit Dr. Castor's opinion that Decedent's death could have been aggravated by his working conditions in conjunction with the testimony of John Janich, Antonio Castillo, and Jesse Herrera as to Decedent's job responsibilities in general and work conditions on the day of his death. I accord little weight to Dr. Greenberg's opinion because his qualifications are not included in the record.

Section 8(f) of the Act shifts part of the liability for death benefits from Employer to the Special Fund established by Section 44 of the Act in situations where a work-related injury combines with a pre-existing partial disability to result in greater permanent disability than would have been caused by the work injury alone. In order to be entitled to Section 8(f) relief, Employer must establish (1) that the employee had an existing permanent partial disability prior to the employment injury; (2) that the disability was manifest to Employer prior to the employment injury; and (3) that the current disability is not due solely to the most recent injury.

Here, it is undisputed that Employer is entitled to Section 8(f) relief and the evidence clearly supports such a finding. More specifically, I find that Decedent's underlying heart condition and diabetes mellitus constituted a pre-existing permanent partial disability and the opinions of Drs. Castor, Carroll, and Greenberg support such a finding. I further find that the Decedent's pre-existing disability was manifest to Employer prior to his fatal cardiac arrest. While there is no evidence to establish disability, constructive knowledge is established by

Dr. Castor's medical records documenting Decedent's condition. Finally, since Decedent's death was only causally related to his employment insofar as it aggravated his pre-existing heart condition, it was not due solely to the most recent work injury.

Average Weekly Wage and Funeral Expenses

Section 10 of the Act sets forth three alternative methods for determining Decedent's average annual earnings, and that figure is then divided by fifty-two weeks pursuant to section 10(d) to arrive at Decedent's average weekly wage. Sections 10(a) and 10(b) are statutory provisions for determining an employee's average annual wages when an injured employee's work is regular and continuous. The computation must be made pursuant to section 10(c) if subsections (a) and (b) cannot be reasonably and fairly applied. Because of the seasonal nature of Decedent's employment, it was not regular and continuous during the year preceding his injury, and therefore, section 10(c) is applied to determine his average weekly wage.

Under section 10(c), I find that a fair and reasonable approximation of Decedent's average annual earnings at the time of his death is the amount he earned in wages in 1991, the year preceding his death. No evidence has been submitted by Employer to contradict that Decedent earned $15,439.70 in wages from American Grain Trimmers and $10,012.70 from Cargill Marine and Terminal in 1991, as evidenced by Decedent's W-2 forms for that year. Accordingly, I credit this evidence to find that Decedent's average weekly wage is his total earnings for

1991, $15,439.70, divided by fifty-two weeks, or $296.92. Death benefits for a surviving spouse are awarded in the amount of 50 per cent of the average weekly wage; therefore, Claimant's death benefit rate, before adjustments, is $148.46 per week.

Reasonable funeral expenses are available pursuant to section 9(a) of the Act. Payment is limited to the actual expense incurred up to $3,000. Only an employer or insurance carrier may be held liable for payment of funeral expenses, and not the Special Fund. Funeral expenses are payable to the person or business providing funeral services or as a reimbursement for such services.

An itemized bill for Rosemoor Funeral Home in Lansing, Illinois, submitted as Claimant's exhibit 12, establishes that Claimant's funeral expenses totaled $2,013.42. Employer has proffered no evidence to the contrary. Therefore, Employer is liable for $2,013.42 in funeral expenses.

ORDER

1. Employer, American Grain Trimmers, shall pay to Claimant, Marian Janich, death benefits in the amount of $148.46 per week for a period of 104 weeks commencing August 12, 1992. Thereafter, benefits shall be payable by the Special Fund.

2. Statutory adjustments shall be made in accordance with section 6 of the Act.

3. Employer shall pay Decedent's funeral expenses of $2,013.42.

4. Interest on past due installments shall be computed in accordance with 28 U.S.C. § 1961.

/s/ Robert G. Mahony
ROBERT G. MAHONY
Administrative Law Judge

Date Issued: March 1, 1996
RGM/LD/krt
Washington, D.C.

[Dated April 19, 1995]

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

PAUL JANICH, Claimant,	)	
vs.	)	OWCP No. 10-32147
AMERICAN GRAIN TRIMMERS, Employer.	)	

The evidence deposition of RICHARD J. CARROLL, M.D., called by the Employer for examination, taken pursuant to the rules of proceedings before the Office of Administrative Law Judges of the United States Department of Labor of the State of Illinois pertaining to the taking of depositions, taken before NICKEY AMICO, a Notary Public within and for the County of Cook, State of Illinois, and a Certified Shorthand Reporter of said state, at Suite 1400, 211 West Wacker Drive, Chicago, Illinois on the 19th day of April, A.D. 1995, at 10:00 a.m.

* * * * *

[21] Q: Dr. Castor testified that it was his opinion Mr. Janich was a candidate for sudden cardiac death. Do you agree or disagree with that opinion?

A: I agree with that opinion.

Q: Could you tell us the basis for your agreement with that opinion?

A: First of all, the fact that he had a myocardial infarction in 1981, anytime that the heart muscle is scarred, meaning anytime that there's been an infarction, there's a potential area for arrhythmias, probably related to the peri-infarct zone where that part of the heart muscle may or may not still be ischemic. It sets up a substrate for arrhythmias.

This was confirmed by the clinical science that the patient had passed out and experienced occasional heart skipping in 1981 at which time he underwent a Holter monitor showing in fact he was having ventricular arrhythmias as manifested by the multi-focal PVCs and ventricular couplets.

In my experience as a board certified practicing cardiologist, multi-focal PVCs often forbade worse than unifocal nonmulti-focal arrhythmias [22] suggesting that there may be multiple sites in the ventricle that are irritable causing this type of arrhythmia.

In the heart failure literature with sudden death thought to be the mechanism of demise of many people with congestive heart failure, a patient that I would see in 1995 that had had an old infarct and had ventricular arrhythmias would be treated aggressively more than likely with either Holter monitor and/or electrophysiology study. However, the state of the art in 1981 was a bit different at that time.

Q: Doctor, based on your review of the materials that you had before you at the time, did you develop an opinion to a reasonable degree of surgical and medical certainty as to the cause of Mr. Janich's death on August 12, 1992?

A: Yes, I did.

Q: And what is that opinion?

A: Obviously there was no autopsy performed and I have never examined Mr. Janich and I was not there at the time of his demise, but from the records provided me, a patient that has severe left ventricular dysfunction, a number of risk factors for the [23] development of coronary disease, an old infarct by EKG and a history of arrhythmias, someone who has what appears to be sudden death would most likely have died from in fact sudden death, but as I mentioned, there was no autopsy available, so to say exactly what the cause of death is is speculative at best.

Q: When you use the phrase "sudden death", are you using a medical phrase of art or is that just something for the general population?

A: Is a phrase that physicians often use.

Q: And how do you define sudden death?

A: That's a good question. Sudden death is basically a phenomenon where there's no obvious precipitating event such as a car accident or an acute infarct and the patient is from a relative state of wellness and suddenly dies without an obvious precipitating cause.

* * * * *

[26] Q: In your experience, is there any evidence as to arrhythmias being caused by activity or exertion or exercise?

A: There is one type of arrhythmia that is called [27] an exercise-introduced ventricular tachycardia. It usually

relates to a scar on the right ventricle, probably a congenital abnormality that when people exercise their catecholamine level gets high, it can predispose a type of ventricular arrhythmia.

Q: From your review of the medical records, did you see any evidence of this type of arrhythmia in Mr. Janich?

A: No, I did not.

Q: Doctor, I would like you to also understand that during Mr. Castillo's testimony, he testified that Mr. Janich had been in the office for about one hour prior to his death, he and a federal man, presumably a representative from the Department of Agriculture, came out of the office to request that the barge be stopped or the loading of the barge be stopped, I should say.

Is there anything in that activity as it was described by Mr. Castillo that you find strenuous or stressful or likely to induce sudden cardiac death or cardiac arrhythmias?

A: Since I'm unfamiliar with exactly what that activity entails, the best answer I can give is from the report that you just read me, there did not seem to be anything in there that would precipitate an [28] arrhythmia, but I have to say that I am unfamiliar with that activity specifically and I wasn't there at the time that it was performed, but from the report that you read there doesn't seem to be anything in there that would suggest that.

Q: Doctor, I would like you to also understand that Jessie Herrera, H-e-r-r-e-r-a, has testified in this matter and he testified that Mr. Janich was on the dock watching the draft of the barge giving instructions to the men

on the barge, meaning Mr. Herrera and Mr. Castillo, and that at that time the grain inspector from the Department of Agriculture indicated that the barge should be closed. Prior to that point, Mr. Janich had walked up and down the dock to check the draft marks.

Based on that description by Mr. Herrera, do you find anything that would be stressful or stress-inducing?

A: I think you need to be more specific about what you mean by stressful or stress-inducing.

Q: Likely to induce cardiac arrhythmias or other types of cardiac conditions which would cause concern to a cardiologist.

A: If I had a patient that had this particular [29] medical history and he asked if he could go to work and perform those kinds of duties, I would not limit him in doing that.

Q: Doctor, do you have an opinion as to whether Mr. Janich's death in August, 1992 was causally related to his employment activities on that day as they've been described in the reports from the various witnesses to you?

A: From the records available to me and from my perusal of the records, there does not seem anything to be in his work-related activity that would have precipitated his sudden death.

* * * * *

[47] Q: Would you admit it's possible that if Mr. Janich, taking into account his prior history of heart trouble, if he was at work on the last day of his life and he was responsible for getting actually two barges loaded

that day, the first one was successfully completed and he did all the tasks I described before such as making sure that the final stages of the barge were loaded successfully, assume that they were working on the second barge and he was responsible for getting that one completed also but work was interrupted during that process because there was rain, some rain coming down, and the Department of Agriculture official on the scene decided or determined that the amount of rain coming down was such that they shouldn't proceed with the loading operation and told Mr. Janich and his crew to suspend operations at that time.

Now, isn't this a situation in which he had a responsibility to get the barge loaded, had a situation where he couldn't complete the job right away [48] because of either, A, weather conditions or, B, the determination of the agriculture official or both, he had to stop the work that he was responsible to have done? Now, due to these circumstances, might he not have felt stress, might he not have had an adrenaline or catecholamine response within his body where catecholamine was distributed through the circulatory system through his heart and causing the arrhythmic condition that led to his immediate death?

MR. SUJACK: I'm going to object as to the form of the question. At the outset, it was said, "you agree as you previously have." First of all, that is erroneous. The doctor has not agreed with that. And, secondly, the question presumes facts which are not in evidence, so for those two reasons it is objectionable.

BY MR. NEWMAN:

Q: You can proceed to answer the question. The administrative law judge will rule on the admissibility of your response.

A: Since the question is speculative, my answer would have to be speculative, and it would seem to me in my opinion that if this man was performing a task and the responsibility of that task was removed by a federal agent, then he was no longer responsible for [49] the task which would in my opinion decrease his stress level as you described it rather than increasing it.

Q: Can –

A: To answer the question more fully, the only thing I have available to base my opinion on is the records that were made available to me, and from the records made available to me as stated in my report, there was nothing work-related in my opinion that would precipitate this man's demise.

Q: Well, to try and explain my question a little bit better to you, just because the agriculture department official determined that the rain was such that they can't continue with the operation right now, that doesn't mean that they're never going to have to load that barge. They're still responsible for getting that cargo out.

MR. SUJACK: I'm going to object. You're arguing with him.

MR. NEWMAN: You are probably right.

BY MR. NEWMAN:

Q: But at any rate, don't you agree it's possible that the man trying to do this job could have felt some stress because he had a responsibility to get the barge loaded so the cargo could be transported to his [50] destination and yet he couldn't make any progress towards that because the rain and the Department of Agriculture official prevented him from proceeding?

MR. SUJACK: I'm going to object on two grounds. First of all, that question is argumentative. Secondly, the doctor has identified two different types of stresses and your question has not done so.

BY THE WITNESS:

A: I've never met Mr. Janich so I don't know what he was experiencing at that time, and for me to answer that question would be speculative and it would be an opinion of mine based on nothing other than the way you formed the question.

* * * * *

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IN THE

Supreme Court of the United States

AMERICAN GRAIN TRIMMERS, INC., and
FRANK GATES-ACCLAIM,

Petitioners,

v.

OFFICE OF WORKERS' COMPENSATION PROGRAMS,
and MARIAN JANICH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MARIAN JANICH

ROBERT T. NEWMAN
O'CONNOR, SCHIFF & MYERS
2 North La Salle
Suite 1000
Chicago, Illinois 60602
(312) 345-7200

JOHN C. SANDS
Counsel of Record
33 North Dearborn
Suite 1630
Chicago, Illinois 60602
(312) 236-4980

Attorneys for Respondent Marian Janich

156335

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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Now comes the Respondent, MARIAN JANICH by her attorneys, JOHN C. SANDS and ROBERT T. NEWMAN OF O'CONNOR, SCHIFF & MYERS and says that this Honorable Court should *not* grant a Writ of Certiorari to review the decision of the Seventh Circuit Court of Appeals in this matter.

INTRODUCTION

The Respondent Marian Janich respectfully argues that the petitioner American Grain Trimmers, Inc. has incorrectly phrased the "QUESTION PRESENTED".

THE "QUESTION PRESENTED" is *not* and has not been whether a properly framed opinion by a qualified physician with appropriate credentials constitutes "substantial evidence to the contrary" of the presumptions of Section 20 of the Longshoremen's and Harbor Workers' Compensation Act.

Instead, the question before the Administrative Law Judge, Benefits Review Board and Seventh Circuit Court of Appeals has been whether the opinion of Dr. Richard Carroll, the employer's expert witness had or had not been substantial evidence to rebut the widow Marian Janich's prima facie claim that her husband Paul Janich had suffered death arising out of and in the course of employment while at work on a grain dock at the Port of Chicago on August 12, 1992.

The Seventh Circuit Court of Appeals, the Benefits Review Board and Administrative Law Judge Robert Mahony all concluded that Dr. Carroll's testimony was not substantial evidence to rebut the presumption, and therefore to characterize his testimony as a "properly framed opinion" assumes a premise contrary to the results below.

STATUTES INVOLVED

Longshoremens' And Harbor Workers' Compensation Act:

33 U.S.C.A. § 909

> If the injury causes death, the compensation therefore shall be known as a death benefit and shall be payable in the amounts and to or for the benefit of the persons following:
>
> (a) reasonable funeral expenses not exceeding $3,000.00
>
> (b) If there be a widow . . . to such widow . . . 50 percentum of the average wages of the deceased . . .

33 U.S.C.A. § 920

> In any proceeding for enforcement of a claim under this Act, it shall be presumed in the absence of substantial evidence to the contrary
>
> (a) that the claim comes within the provisions of this Act

THE STATEMENT OF THE CASE

The statement of the case as presented in the Petition for a Writ of Certiorari is misleading as to the evidence of decedent Paul Janich's actions about 1:00 p.m. to 2:00 p.m. on the day of his death August 12, 1992 and as to the demanding nature of his job. (References are to the Appendix in the Petition for Certiorari.)

The Administrative Law Judge found that Paul Janich was the leader of a group of grain trimmers the day he died. He started at 8:00 a.m. It was a rainy day. They were working on a barge and finished it in the morning and worked loading another barge until a grain inspector stopped them, because the weather became bad, raining heavily. App. 49. Paul Janich ordered his men to come off the barge. App. 49. The barge had to be closed to prevent the grain from becoming wet, because wet grain spoils. App. 49.

Paul Janich collapsed and died immediately after giving the order, to his men, to come off the barge. App. 49.

There is an urgency to closing up the vessel when the rain becomes heavy to prevent the grain from being spoiled.

John Janich, another gang leader and the decedent's brother, explained that the process of loading barges with grain calls for the gang leader to supervise the loading of 44,000 to 60,000 bushels weighed 1,100 to 1,500 tons. App. 45. The gang leader is responsible for loading the barge without exceeding draft limits and so that the barge is balanced, with no listing to the inboard nor outboard nor bow nor stern. App. 45-46. There is difficulty in loading the barges without listing. App. 47.

The gang leader is responsible for the safety of his men. App. 47. This Summer of 1992 had been busy for grain trimmers in the Port of Chicago. App. 48.

Paul Janich himself had worked about 33 days out of 38 calender days from July 6, 1992 until August 12, 1992. App. 48.

One of claimant's theories is that working these 33 days had fatigued Mr. Paul Janich and the fatigue was a factor in the fatal heart attack. App. 52.

Claimant's further theory is that stress of having to stop the barge loading operation on an urgent basis on August 12, 1992 had precipitated the fatal heart attack. App. 52.

The claim is supported in this regard by testimony of Dr. Castor, claimant's Exhibit 20 that any time a person with a diseased heart does any strenuous activity then that can aggravate the condition of the diseased heart and a fatal heart rhythm disorder can be precipitated. App. 52-53.

This latter theory was specifically found creditable by the Administrative Law Judge Robert Mahony. App. 57-58.

Dr. Richard Carroll opined that Mr. Janich could have died of sudden cardiac death due to a loss of heart rhythm with no precipitating cause. App. 64.

Dr. Carroll opined as to the cause of death, given Mr. Janich's poor left ventricular function, coronary disease and history of arrhythmia, could have been sudden cardiac death, but what was the cause of death is speculative at best. Dr. Carroll's dep. pg. 23, App. 57.

Dr. Carroll testified he did not see anything in defense counsel's report of the activities of Mr. Janich to cause a fatal heart arrhythmia. App. 65.

But, Dr. Carroll admitted on direct and on cross examination that he really did not understand Mr. Janich's job duties. Dr. Carroll actually said this four times in the

deposition, at pages 27, 28, 32 and 50, and two of these are replicated in the appendix, at App. 65, 69.

Dr. Carroll testified he did not know whether Mr. Janich having worked 33 of 38 calender days immediately preceding his death had been a contributing cause of the death. App. 55, 57.

The Administrative Law Judge opined that since Dr. Carroll testified that the cause of Mr. Janich's death was speculative at best, then Dr. Carroll's opinion as to whether the work activity had or had not been a causative factor must also be speculative. The Administrative Law Judge went on to say that Dr. Carroll's opinion that Mr. Janich died of cardiac arrhythmia. is based largely on probabilities, the 50% mortality of patients with poor left ventricular function and that those who die "Often" do so as a result of arrhythmia. App. 57. The Administrative Law Judge also wrote

> Moreover Dr. Carroll's conclusion that the decedent's death is unrelated to work is undercut by his concession that he does not know if the cumulative effort of the amount decedent worked in the 38 days before his death could have been a precipitating cause of death.

App. 57.

There is an implied admission in this response that work could have been an aggravating factor that precipitated the death. If so, then granting workers' compensation benefits would be consistent with precedent, e.g. *Wheatley v. Adler*, 407 F.2d 307 (1968) (U.S. Court of Appeals for the District of Columbia Circuit).

The Benefit Review Board affirmed the Administrative Law Judge. App. 31-32.

The Seventh Circuit Court of Appeals ruled that the Administrative Law Judge simply found that Dr. Carroll's testimony was so hedged and speculative that it did not undercut the claimant's prima facie case. App. 14.

The Seventh Circuit Court of Appeals at page 14 of its opinion:

> True, Dr. Carroll said he was confident that Mr. Janich's occupation and work did not cause his death but the doctor also said in effect that he had no idea what work Mr. Janich was performing in the days and weeks leading up to his death.

App. 14.

The Court was correct. The witness Dr. Carroll admitted more than once that he did not understand Mr. Janich's work and responsibilities. If the doctor did not understand the decedent's job then he could not rationally rule out the job as a precipitating cause of a fatal heart rhythm disturbance.

Particularly since the decedent collapsed and died immediately after an urgent task — stopping the loading operation so the grain already in the barge would not be drenched, by the rain, and Mr. Janich was doing this activity on the waterfront in a bad weather situation, it is readily understood that the work activity could have been a precipitating cause of the death. The presumption of Section 20(a) should be invoked where, as here, the death occurred in the course of employment. *See Bell Helicopter International v. Jacobs*, 746 F.2d 1342 (8th Cir. 1984).

THE CASE AT BAR IS NOT A CASE IN WHICH A WRIT OF CERTIORARI SHOULD BE GRANTED UNDER SUPREME COURT RULE 10

A. Rule 10. Considerations Governing Review On Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) A United States Court of appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state

> court of last resort or of a United States Court of Appeals;
>
> (c) A state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

APPLICATION OF RULE 10 TO THE CASE AT BAR

The Petition for Certiorari attempts to raise an argument that there is a conflict between the opinion of the Seventh Circuit Court of Appeals and a decision of the First Circuit Court of Appeals in *Bath Iron Works v. Director, O.W.C.P.*, 137 F.3d 673.

In that case the First Circuit articulated:

> . . . the presumption is overcome with substantial evidence of non-causation. See *Sprague* 688 F.2d at 865. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. This includes reasonable probabilities.

137 F.3d 673, 675.

In the case at bar the Seventh Circuit held that the employer's burden, once the claimant had made a prima facie case, is a burden of production of evidence.

By statute, the evidence to be produced by the employer must be substantial. The Seventh Circuit wrote that there are many phrases known to the law to describe how much evidence is substantial enough to justify a particular result, at page 12 of the Seventh Circuit opinion. App. 12.

The Seventh Circuit then quoted *Richardson v. Perales*, 402 U.S. 389 (1971) for the phrase "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The Seventh Circuit also cited *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 at 507 (1993), for a formulation it found to be equivalent. There is a burden on an employer in an employment discrimination case to produce through admissible evidence, "reasons for its actions which if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action"

The Seventh Circuit Court of Appeals also cited *Stedman v. SEC*, 450 U.S. 91, for a proposition that substantial evidence also denotes quantity. A decision based on substantial evidence requires a quantity of evidence in support. App. 12.

The First Circuit opinion in *Bath Iron Works* does not conflict with the case at bar on the topic of what constitutes substantial evidence to rebut the presumption of 33 U.S.C. § 920(a).

Instead, these Circuits agree on the formulation and definition of what constitutes substantial evidence.

The Seventh Circuit followed United States Supreme Court precedent in its definition and explanation of what constitutes substantial evidence. In fact the Seventh Circuit in the case at bar and the First Circuit in the *Bath Iron Works* case both cited and followed the same precedent, from the First Circuit *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1982).

The *Bath Iron Works* precedent was different on its facts and the procedural history of the case from the case at bar.

In *Bath Iron Works*, the employer's expert physician had a specific reason for denying that the claimant's cancer had been caused by occupation exposure to asbestos. The reason was x-ray evidence that showed the claimant had cancer but not fibrosis. Cancer without fibrosis was consistent with cigarette induced cancer. If asbestos exposure had been a causative factor, fibrosis would have been apparent on an x-ray. The Administrative Law Judge had adopted the opinion of the employer's expert.

In the case at bar, the employer's expert did not have a substantial rationale for his opinion, because he admitted he did not understand the decedent's job responsibilities, did not really know the cause of death, did not know whether the cumulative effect of decedent's work over 33 days had been a causative factor in the death.

The Administrative Law Judge as finder of fact has determined that the employer's expert did not present substantial evidence to rebut the presumption that the claim comes within the requirements of the Act.

So the First and Seventh Circuits agreed on the meaning of "substantial evidence to rebut the presumption" but came to different results because the facts of the two cases are different, and because the Administrative Law Judge in *Bath Iron Works* ruled against the claim, but in the case at bar the Administrative Law Judge ruled in favor of the claim.

That substantial evidence is such as a reasonable mind would accept as reasonable to support a determination, is a formulation that has been adopted by several of the Circuit Courts of Appeal.

These formulae are consistent with a line of precedent cases including *DelVecchio v. Bowers*, 296 U.S. 280, 286, 287.

These line of cases has been developed by the District of Columbia in *Swinton v. J. Frank Kelly*, 554 F.2d 1075 (1976) in which it was written that substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. 554 F.2d 1075 at 1083 and it was stated,

> stated otherwise, the presumption may be developed by circumstantial evidence specific and comprehensive enough to sever the potential connection between a particular injury and the job related event

554 F.2d 1075 at 1083.

And similarly this formula has been expressed in *Hensley v. Washington Metropolitan Transport Authority*, 655 F.2d 264, 267 (1981), and *Brown v. Continental Baking*, 921 F.2d 289, 295 (1980).

In *Universal Maintenance Corp. v. Moore*, 126 F.3d 256, 262 (4th Cir. 1997) the Court stated that when the presumption has been raised, then if the employer offers "evidence sufficient to justify a denial of the claim", the presumption drops out of the case.

The definition of substantial evidence used by the Seventh Circuit in this case is similar to that used by the United States Supreme Court, and other Circuit Courts of Appeal.

Administrative Law Judge Mahony applied an analysis that the claimant must make a prima facie case; then the Section 20 presumption is invoked; then the burden shifts to the employer to produce substantial evidence to rebut the presumption. If the presumption is rebutted then the case is analyzed to determine which party has the preponderance of the evidence. App. 36 Footnote 2.

In his reconsideration decision the Administrative Law Judge recited this formula, then on the next page showed that in a precedent case called the *Kubin* case the Benefits Review Board wrote that the burden of proof transferred to the employer. App. 38

The transfer of the burden of proof as distinguished from a burden of production is a standard that Administrative Law Judge Mahony himself had not applied to the employer in this matter.

There was no substantive error by the Administrative Law Judge.

An argument made in the Petition for Certiorari that the employer's burden to rebut the presumption is to produce a

"minimum quantity of evidence, nothing more" is contrary to the statutory requirement that the evidence to rebut the presumption must be substantial. An argument presented within the Petition for Certiorari seems to be that in the phrase "substantial evidence", the word "substantial" refers only to quantity not quality of evidence.

In other words, according to the argument in the Petition for Certiorari, a large quantity of obvious lies or nonsense could be substantial evidence. This is not a valid argument. Substantial evidence has to have some quality and some quantity, sufficient to allow a reasonable mind to accept this evidence as sufficient to support a conclusion.

If a quantum of evidence had no quality at all — then no reasonable person could make a decision based on that evidence.

The dispute in this case is about factual findings or misapplication of a correctly stated rule of law. Therefore under Supreme Court Rule 10, this is not a case on which a writ of certiorari should be granted.

The claimant below presented evidence based on the eyewitness testimony of Herrera and Castillo that Paul Janich had been in charge of loading a barge with grain, when rain started to come down heavily. Paul Janich had to give orders to close down the operation, promptly, to avoid soaking the grain that had just been loaded. Immediately he collapsed and died on the scene. Dr. Castor and Dr. Greenberg presented evidence from which it can reasonably be judged, that the employment precipitated the fatal heart attack. This matter has been correctly decided by the Seventh Circuit, Benefits Review Board, and Administrative Law Judge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN C. SANDS
Counsel of Record
33 North Dearborn
Suite 1630
Chicago, Illinois 60602
(312) 236-4980

ROBERT T. NEWMAN
O'CONNOR, SCHIFF & MYERS
2 North La Salle
Suite 1000
Chicago, Illinois 60602
(312) 345-7200

Attorneys for Respondent
Marian Janich

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No. 99-696

In the Supreme Court of the United States

AMERICAN GRAIN TRIMMERS, INC.
AND FRANK GATES-ACCLAIM, PETITIONERS

v.

OFFICE OF WORKERS' COMPENSATION PROGRAMS
AND MARIAN JANICH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HENRY L. SOLANO
Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
ELIZABETH HOPKINS
Attorney
Department of Labor
Washington, D.C. 20210

17PP

QUESTION PRESENTED

Whether, on the facts of this case, petitioners rebutted the presumption of coverage established by Section 20(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 920(a).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1-22) is reported at 181 F.3d 810. The decision and order of the Benefits Review Board (Pet. App. 23-32), the decision and order of the administrative law judge (ALJ) on reconsideration (Pet. App. 33-40), and the ALJ's original decision and order (Pet. App. 41-61) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1999. On September 13, 1999, Justice Stevens extended the time for filing a petition for a writ of

certiorari to October 19, 1999, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a claim for benefits filed by Marian Janich (the claimant), widow of Paul Janich, under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* (LHWCA or Longshore Act). Pet. App. 4. For all but the first two of his 40 years of employment with petitioner American Grain Trimmers, Inc. (petitioner), Paul Janich worked as a foreman supervising the loading of grain onto barges on the Great Lakes. *Id.* at 2. During the 38 days before his death, Janich worked between 29 and 33 days. On August 12, 1992, Janich began work at 8 a.m. After loading one barge and then breaking for lunch, Janich's crew began to load a second barge. Janich initially monitored that process, as he often did, by radio from his nearby office. When it began to rain heavily, however, a federal grain inspector instructed Janich to suspend the loading operation, to prevent the grain from getting wet. Janich then left the office and walked out to the dock, where he told his crew to stop loading and leave the dock. While supervising that process Janich collapsed and died from a sudden cardiac arrest. *Id.* at 2-3, 24.

Janich had suffered from serious heart and other medical problems for some years before his death. Pet. App. 3-4, 50-51. He returned to work on July 6, 1992, for the first time after having been hospitalized in November 1991, and he died at work a little over a month later. *Id.* at 2, 4. His widow filed a claim for death benefits under the LHWCA. Petitioner opposed the claim.

2. In March 1996, an administrative law judge (ALJ) granted Mrs. Janich's claim. Pet. App. 60-61. The ALJ first found that the claimant had successfully invoked the presumption established by Section 20(a) of the LHWCA, 33 U.S.C. 920(a), which provides that "in the absence of substantial evidence to the contrary," a claim is presumed to come within the provisions of the Act. Pet. App. 55. Relying on the fact that Janich died at work from a cardiac arrest and on the deposition testimony of his treating physician, Dr. Castor, that either physical exertion or emotional stress could have precipitated the arrest, the ALJ concluded that the claimant had made out a prima facie case of entitlement, under Section 20(a), by establishing that "working conditions existed which could have caused Decedent's heart attack." *Id.* at 56.

The ALJ then held that petitioner had not succeeded in rebutting the claimant's prima facie case. Pet. App. 57. Although he found petitioner's expert Dr. Carroll, a Board-certified cardiologist and internist who had reviewed Janich's records, to be a credible witness, the ALJ concluded that Carroll's testimony concerning the lack of any causal relationship between Janich's job and his death was too speculative to constitute "substantial evidence" of lack of causation. *Ibid.* The ALJ relied (*ibid.*) on Dr. Carroll's statement (*id.* at 64) that in the absence of an autopsy, the exact cause of Janich's death (whether, for example, the cardiac arrest was caused by an arrhythmia or by another heart problem) was "speculative at best," and on his testimony (see *id.* at 55) that he did not know if Janich's work history over the 38 days before his death could have been a precipitating factor in his death. The ALJ further noted that Dr. Carroll's opinion that Janich's death was "most likely" caused by a ventricular arrhythmia was based

largely on (i) general mortality figures for individuals with overall heart conditions similar to Janich's and (ii) Dr. Carroll's observation that in such circumstances death is "often" caused by an arrhythmia. *Id.* at 55, 57.

Having concluded that the claimant's evidence indicated that working conditions could have caused Janich's death, and that petitioner had failed to present "substantial evidence to the contrary," the ALJ awarded death benefits on the basis of the statutory presumption in Section 20(a). Pet. App. 57-58. Based on Janich's preexisting heart condition and diabetes, however, the ALJ granted petitioner relief under Section 8(f) of the Act, 33 U.S.C. 908(f), thereby limiting petitioner's liability to 104 weeks of benefits, and shifting the remaining liability to a special fund established for that purpose. Pet. App. 58-59; see *id.* at 6.

On cross-petitions for reconsideration, the ALJ agreed with claimant that an upward adjustment of the calculation of Janich's average weekly wage to reflect the national average was necessary, but rejected petitioner's contention that Dr. Carroll's opinion was sufficient, as a matter of law, to rebut the presumption of causation. Pet. App. 35-40. More specifically, the ALJ disagreed with petitioner's contention that, under the reasoning of this Court's decision in *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267 (1994), the Section 20(a) presumption is rebutted by the production of any contrary evidence. Pet. App. 37.

The ALJ also rejected petitioner's contentions that it was required to produce only a "minimum quantum" of evidence to rebut the presumption, and that the fact-finder was not entitled to assess the weight or credibility of that evidence. Pet. App. 37-38. Noting that "the Section 20(a) presumption is a *statutory* presumption which by its express terms requires the production of

BEST AVAILA

substantial evidence in order to rebut it," the ALJ pointed out that the Department of Labor's Benefits Review Board (BRB or Board) has consistently required that such evidence be "specific and comprehensive"—a standard that requires some assessment of weight and credibility. *Id.* at 38 & n.3. The ALJ also relied on a recent Board decision that he read to hold "that Section 20(a), once invoked, shifts the burden of *proof* to [the] employer on the issue of causation," and he noted that the Board, in that case, had rejected a physician's opinion as too speculative and equivocal to rebut the presumption. *Id.* at 38-39 (citing *Kubin* v. *Pro-Football, Inc.*, 29 Ben. Rev. Bd. Serv. 117 (1995)). The ALJ reiterated his conclusions that Dr. Carroll's opinion concerning the precise cause of Janich's death and its relation to his job was speculative, while Dr. Castor's opinion established that death "could have been related to [Janich's] working conditions." *Id.* at 39. Accordingly, he reaffirmed his determination that petitioner's evidence "fail[ed] to rebut the presumption that [Janich's] death was causally related to his employment." *Ibid.*

3. The Benefits Review Board affirmed. Pet. App. 23-32. The Board first concluded that the ALJ's finding that the claimant had established a *prima facie* case was supported by substantial evidence, including the medical opinion of Dr. Castor. *Id.* at 26- 27. Because the claimant had succeeded in invoking the Section 20(a) presumption, the Board held that the burden had shifted to the employer "to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment." *Id.* at 27. In that regard, the Board held that nothing in the *Greenwich Collieries* decision addressed or undercut the Board's longstanding requirement that rebuttal

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evidence must be "specific and comprehensive." *Id.* at 28. Moreover, the Board noted that "[w]here aggravation of a pre-existing condition is at issue, [the] employer must establish that work events neither directly caused the injury or death nor aggravated the pre-existing condition resulting in injury or death." *Ibid.* Finally, the Board pointed out that if the employer succeeds in rebutting the Section 20(a) presumption, the ALJ must then weigh all of the evidence and resolve the issue of causation on the basis of the entire record. *Ibid.*

Applying those principles, the Board affirmed the ALJ's determination that petitioner had failed to rebut the Section 20(a) presumption. Pet. App. 28. Noting the ALJ's reliance on Dr. Carroll's testimony that the exact cause of death was speculative, that he could not rule out the cumulative effect of Janich's final month of work as a cause of death, and that he did not know the exact activities performed by Janich on his final day or how physically strenuous his job was, the Board sustained the ALJ's conclusion that "Dr. Carroll's opinion did not unequivocally rule out a connection between decedent's employment and his death." *Id.* at 28-30. The Board further observed that the record did not contain any other medical opinion that was sufficient to rebut the presumption of causation, and it accordingly affirmed the award of benefits. *Id.* at 30-31.

4. The court of appeals affirmed, having first decided, *sua sponte*, to hear the case en banc. Pet. App. 1-22; see Pet. 6. The court first summarily rejected petitioner's contentions that there was insufficient evidence in the record to invoke the Section 20(a) presumption, and that in any event petitioner was entitled, on the whole record, to judgment as a matter of law. Pet. App. 8. The court then considered what, as a legal matter, an

employer must do to rebut the Section 20(a) presumption (*id.* at 8-13), and whether the ALJ and the BRB should have held that petitioner had rebutted the presumption in this case (*id.* at 13-16).

On the first issue, the court addressed "two fundamental questions: first, what kind of burden shifts to the employer, a burden of production or a burden of persuasion; and second, what quantity or quality of evidence is enough to satisfy that burden, whether it relates to production or persuasion." Pet. App. 9. Relying on *Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935), and *Greenwich Collieries*, the court concluded that in Longshore Act cases, as in employment discrimination cases, only the burden of production shifts to the employer. Pet. App. 9-11; compare *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502 (1993). As to what evidence will satisfy that burden, the court observed that Section 20(a) on its face requires the employer to produce "substantial evidence." Pet. App. 11. Relying on *Steadman* v. *SEC*, 450 U.S. 91, 98 (1981), the court explained that "[t]he word 'substantial' denotes quantity," while the Administrative Procedure Act's requirements that evidence be relevant, reliable, and probative "add[] a qualitative dimension * * * as well." Pet. App. 12. Adopting a summary phrase "well known to the law," the court concluded that in order to rebut the Section 20(a) presumption, an employer must introduce "such relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion" that the employee's injury or death was unrelated to his or her employment. *Id.* at 12-13 (quoting *Richardson* v. *Perales*, 402 U.S. 389, 401 (1971)).

Turning to the facts of this case, the court first noted that it saw no inconsistency between the standard it had articulated and the ALJ's statement that the

employer must produce "specific and comprehensi[ve] evidence, not speculation." Pet. App. 13; see *id.* at 56. The court explained that a requirement of specificity in rebuttal does not shift the burden of persuasion, any more than does a court's refusal to accept a vague or speculative affidavit as sufficient to defeat a motion for summary judgment. *Id.* at 13. The court then agreed with the ALJ (and the BRB) that "Dr. Carroll's testimony was so hedged and speculative that it did not, even taking it at face value, undercut Mrs. Janich's *prima facie* case," and that "[a] decision based solely on Dr. Carroll's statements would not have had the support of substantial evidence in the record." *Id.* at 14. Hence, "the ALJ was entitled to find that [petitioner] did not introduce substantial evidence to rebut the § 20(a) presumption of coverage." *Ibid.*

The court acknowledged that ambiguities in the ALJ's opinion on reconsideration raised "the possibility that the ALJ might have wrongly thought that the burden of persuasion," rather than merely a burden of production, "shifted to the employer." Pet. App. 14-15. The court pointed out, however, that the ALJ's original decision, which included his central finding concerning the employer's failure to rebut, correctly articulated the applicable legal standards. *Id.* at 15. The court concluded that any analytical error that might be reflected in the opinion on reconsideration was harmless, because the ALJ "had the right standard in mind when he assessed the employer's evidence in the original opinion," and because the BRB applied the correct standard when it reviewed and upheld the ALJ's decision. *Id.* at 15-16. The court accordingly affirmed the award of survivor's benefits to Mrs. Janich. *Id.* at 16.

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Chief Judge Posner (joined by Judges Coffey, Easterbrook, and Manion) agreed that invoking the Section 20(a) presumption shifts only a burden of production to the employer, leaving the burden of persuasion on the claimant, but he dissented from the majority's application of that analysis to the facts of this case. Pet. App. 16-19. Reviewing Dr. Carroll's testimony, Chief Judge Posner concluded that it constituted specific, credible, expert opinion evidence that "Janich's death was completely unrelated to his employment" (*id.* at 17), and that it was sufficiently "substantial" to satisfy the employer's burden of production. He would accordingly have remanded the case to the BRB for reconsideration in light of all the evidence, without reliance on the Section 20(a) presumption. *Id.* at 19.

Judge Flaum (also joined by Judge Manion) similarly "agree[d] with the Majority's well reasoned analysis of the 20(a) presumption" (Pet. App. 20), but dissented from the application of that analysis in this case. *Id.* at 20-22. In Judge Flaum's view, Dr. Carroll's expert opinion amounted to "substantial evidence" that Janich's work "played no role in his death." *Id.* at 21-22. Thus, "[h]ad the Majority's approach actually been followed, the ALJ would have eliminated the presumption and analyzed the case on the record as a whole." *Id.* at 21. Judge Flaum emphasized that, after such an analysis, the ALJ "[might] well have concluded that Mrs. Janich proved by a preponderance of the evidence that Mr. Janich's work was the most likely cause of his death." *Id.* at 22. Because, however, he "[could not] be sure what role the improperly retained presumption played in the decision" to award benefits, Judge Flaum would also have remanded the case "for reconsideration consistent with the clear approach the Majority outlines today." *Ibid.*

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ARGUMENT

1. Section 20(a) of the Longshore Act, 33 U.S.C. 920(a), provides that in the adjudication of any claim for benefits under the Act, "it shall be presumed, in the absence of substantial evidence to the contrary * * * [t]hat the claim comes within the provisions of" the Act.[1] Once the presumption of coverage under Section 20(a) is invoked, it controls the result unless the employer presents testimony or other evidence "sufficient to justify a finding" that the incident was not work-related, in which case "the presumption falls out of the case" and the matter is resolved by the factfinder on the basis of all the evidence, with the claimant bearing the ultimate burden of persuasion. See *Del Vecchio* v. *Bowens*, 296 U.S. 280, 286 (1935) (addressing related presumption under Section 20(d)); *U.S. Indus./Fed. Sheet Metal, Inc.* v. *Director, OWCP*, 455 U.S. 608, 612 n.5 (1982) (presumption under Section 20(a) is of same nature as that under Section 20(d)).

The court of appeals properly articulated this legal framework for determining whether the Section 20(a) presumption has been rebutted, with all 11 judges endorsing that portion of the court's opinion. Pet. App. 8-13, 16, 20. The court then analyzed the record in this case and sustained the conclusion of the ALJ and the Benefits Review Board that petitioner did not rebut the presumption of coverage because the testimony of its expert witness was "so hedged and speculative" that it could not, even if fully credited, have supported a decision in petitioner's favor on the ultimate issue of

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[1] Section 20 also establishes presumptions that notice of the claim is sufficient and that the employee's injury or death was not due to his intoxication or to his intention to injure or kill himself or another person. 33 U.S.C. 920(b)-(d).

work-relatedness, and thus did not amount to "substantial evidence" within the meaning of Section 20(a). *Id.* at 14; see *id.* at 13-16. The dissenting opinions differ from the court's opinion only in their evaluation of the strength of petitioner's evidence and their consequent conclusion that this case should be remanded to the BRB for further consideration in light of the court's clear articulation of the applicable legal rules. See *id.* at 16-22. That fact-bound issue does not warrant review by this Court.

2. There is no merit in petitioner's contention (Pet. 9, 13, 15-16) that the decision below conflicts with *Bath Iron Works Corp.* v. *Director, OWCP*, 137 F.3d 673 (1st Cir. 1998). The court in *Bath Iron Works* articulated exactly the same test as the court in this case:

> As we have previously held, the presumption is overcome with substantial evidence of non-causation. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

137 F.3d at 675 (citations omitted); compare Pet. App. 12-13. The court then reversed the BRB and sustained the ALJ's conclusion, "backed by an extensive discussion of the several experts," that the employer's evidence concerning the likely cause of the claimant's lung cancer was sufficiently "substantial" to rebut the Section 20 presumption and support the ALJ's ultimate finding in favor of the employer. 137 F.3d at 675-676. As in this case, the court's opinion was rendered over a dissent that did not question the majority's definition of "substantial evidence," but interpreted the record differently and would have reached the opposite result under that test. *Id.* at 676-677 (Lynch, J., dissenting). Any apparent differences in the outcomes of the two

cases are accordingly attributable, not to disagreement between the courts on any principle of law, but to the inevitable variations that arise in the application of a legal test to particular facts.

Petitioner attempts to portray these variations as legal conflicts by maintaining, for example, that the court below could have reached its conclusion in this case only by according "deference" to the findings of the ALJ. Pet. 8. The court did not "defer" to the ALJ, however, but rather "agree[d]" with him, based on its own review of the evidence, that "[a] decision based solely on Dr. Carroll's statements would not have had the support of substantial evidence in the record." Pet. App. 14. Similarly, there is no inconsistency between the decision in this case and *Bath Iron Works*' point (137 F.3d at 675) that an expert opinion may constitute "substantial evidence" even though it speaks only in terms of "reasonable probabilities." The court below did not reject reliance on Dr. Carroll's opinion because it was rendered only to "a reasonable degree of medical certainty" (Pet. 8), but rather because the court shared the view of the ALJ and the BRB that the opinion was unduly "hedged and speculative" as to the exact cause of Janich's death, a point which was critical to the doctor's further opinion concerning whether Janich's death was in any way related to his work. Pet. App. 14.

Nor is there weight to petitioner's claims that the decision below "requires [that] the evidence presented * * * to rebut the presumption be sufficient to persuade the ALJ on the ultimate issue" (Pet. 10) or "transforms the burden in rebutting the presumption into the functional equivalent of refuting the claim by a preponderance of the evidence" (Pet. 15). Apart from stating as plainly as is possible that "the burden of persuasion rests at all times on the claimant" (Pet. App.

10-11), the court of appeals made clear that the employer need only produce evidence that, if believed by the trier of fact and considered in isolation (rather than weighed against the claimant's evidence), would be sufficient to support a finding that the employee's injury or death was not related to his employment. See *id.* at 12-14.[2] At bottom, petitioner's contention, like that of the dissenters below (and the dissenter in *Bath Iron Works*), is only that the court misapplied the proper legal test. That contention does not merit further review.

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[2] Similarly, whatever the merit of petitioner's argument (Pet. 10-11, 13-15) that credibility should play no role in determining whether the presumption has been rebutted, this case presents no such issue. As the BRB noted (Pet. App. 28), the ALJ specifically found Dr. Carroll to be "credible" (*id.* at 57), and the court of appeals did not question that assessment. The court instead upheld the ALJ's determination that "Carroll's testimony was so hedged and speculative that it did not, *even taking it at face value*, undercut Mrs. Janich's *prima facie* case." *Id.* at 14 (emphasis added).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

HENRY L. SOLANO
Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
ELIZABETH HOPKINS
Attorney
Department of Labor

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No. 99-0696

In the Supreme Court of the United States

AMERICAN GRAIN TRIMMERS, INC., and FRANK GATES-ACCLAIM,

Petitioners,

v.

OFFICE OF WORKERS' COMPENSATION PROGRAMS, and MARIAN JANICH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

GREGORY PAUL SUJACK
Counsel of Record
DAVID F. BUYSSE
TODD E. WEGMAN
GAROFALO, SCHREIBER & HART, CHTD.
211 West Wacker Drive
14th Floor
Chicago, Illinois 60606
(312) 670-2000

Attorneys for Petitioners

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

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ARGUMENT

Petitioners hereby submit their reply to the briefs in opposition filed by the Federal Respondent and by Respondent Janich.

1. REPLY TO BRIEF IN OPPOSITION BY THE FEDERAL RESPONDENT

The Federal Respondent argues that the decision below does not conflict with the decision of the First Circuit in *Bath Iron Works v. Director, O.W.C.P.*, 137 F.3d 673 (1st Cir. 1998). The First Circuit analyzed its case by noting that the Benefits Review Board placed an extreme hurdle in front of an employer attempting to rebut the presumption in §20. In the present case, the court below blessed the rejection of Dr. Carroll's opinions by the administrative law judge. The Federal Respondent accepts the semantics of the court below that it agreed with the administrative law judge in his determination of the quality of the opinions of Dr. Carroll. However, the Federal Respondent does not address the issue of whether the administrative law judge placed an extreme hurdle by making such an analysis when he was ruling on the question of law of whether the evidence was of a minimum quantum (*Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255, n.8 (1982)), more than a mere scintilla (*Richardson v. Perales*, 402 U.S. 389, 401 (1971)), or enough to allow a reasonable mind to accept as adequate to support a conclusion (*Consolidated Edison v. N.L.R.B.* 305 U.S. 197, 229 (1938)). Certainly, Dr. Carroll's opinions fit within these definitions, and would have cleared the statutory hurdle.

As noted by the Federal Respondent, the majority of the court below required that the opinions of Dr. Carroll "ha[ve] the support of the substantial evidence in the record." Fed.Br. 12. This improper analysis appears to have been adopted by the Federal Respondent for a number of reasons. Initially, the question for the court below (as it was for the administrative law judge) was a question of law, i.e., whether the opinions of Dr. Carroll constitute substantial evidence. The overly restrictive definition of "substantial evidence" established by the Benefits Review Board, as noted by the administrative law judge, places the ultimate burden of proof squarely on the employer.

The second reason is that the Federal Respondent believes the rebuttal burden requires an employer to produce evidence that is "believed by the trier of fact . . ." Fed.Br.13. This is quite similar to requiring the employer rebut the burden by a preponderance. This cannot be what was envisioned by this Court when it enunciated the "reasonable mind" standard in *Consolidated Edison*. In fact, it is expressly contrary to the "reasonable mind" standard. The Federal Respondent thus proves the Petitioners' argument that the decision below is in conflict with the prior decisions of this Court. Also, contrary to the argument of the Federal Respondent, the court below did not misapply the proper legal standard. Rather, the court below ignored precedents of this Court.

The last reason for the improper analysis by the Federal Respondent is that it fails to square the definition below with this Court's interpretation of "substantial evidence" in *Steadman v. SEC*, (450 U.S. 91 (1981)). Weighing the evidence for its probity is not a

fact based question for the courts or the administrative bodies when determining whether relevant evidence is substantial under §20 of the Longshore Act. It is a question of law.

By ignoring *Steadman*, the Federal Respondent fails to account for the differences in the burdens on a party on review by the phrase "substantial evidence in the record" in §21 of the Longshore Act (33 U.S.C. §921) and "substantial evidence to the contrary" that is required to rebut the presumption within §20 of that act (33 U.S.C. §920). While Congress appears to have inartfully used the same wording in drafting the statute, the phrases clearly have significantly different meaning. The former phrase occurs in appellate proceedings before the Benefits Review Board and the various courts. It involves the analysis of whether the findings of fact by an administrative law judge have support in the record. Unfortunately, this is the analysis used by the court below in determining the issue of law of whether the employer's medical opinions were "substantial."

The use of the phrase in §20 applies to the interim evidentiary determination made by an administrative law judge during the course of a formal hearing in analyzing whether the presumptions have been rebutted. The determination is one of a quantity of relevant evidence, consistent with *Steadman*. The majority below and the Federal Respondent must reject this in order to maintain their positions on this question.

The Federal Respondent suggests in a footnote (Fed. Br.13, n.2) that the credibility or weighing of Dr. Carroll's opinions performed by the administrative law judge is not at issue. The Federal Respondent notes

that the doctor was found credible, but his opinions were rejected as being hedged or speculative. If an expert renders "credible" testimony, and the substance of the doctor's testimony was his medical opinions, it is logically inconsistent to suggest that the testimony is credible but those opinions are speculative or are otherwise defective. This position can only derive its genesis from shifting the ultimate burden of proof to the employer, so as to require the employer to refute all possibilities in the defense of the case. In such an analysis, the only way for an employer to rebut the presumption is to win the case outright. This is the position of the Benefits Review Board as demonstrated by its holding in the present case and elsewhere. This cannot be the intended consequence. Therefore, credible expert testimony that addresses the ultimate issue in a case must as a matter of law be sufficient to rebut the presumption.

Yet, despite the decision in *Bath Iron Works*, the Board continues its misapplication of the law, going so far as to continue to require employers to rule out all possibilities of a causal relationship between employment and injury. Fortunately, as did the First Circuit, the Fifth Circuit recently saw through this improper administrative burden to rebut the presumption. *Conoco, Inc. v. Director, O.W.C.P.*, 194 F.3d. 684 (5th Cir. 1999). Despite finding in favor of the injured worker, the Fifth Circuit was compelled to comment on the analysis of §20 utilized by the Benefits Review Board. "The language [of §20] does not require a 'ruling out' standard; indeed, the hurdle is far lower . . . To place a higher standard on the employer is contrary to statute and case law. We therefore unequivocally reject the

'ruling out' standard applied by the Board in this case." *id.* at 690. In the present case, the employer was compelled to "sever" the causal relationship. App.37 (ALJ), 27 (BRB). It would seem that the Fifth Circuit would also reject any burden on the employer to disprove all possible avenues of liability.

Finally, it is interesting to note that the position taken by the Federal Respondent in opposition to the grant of the Petition appears to be contrary to the duties imposed on the Director of the Office of Workers Compensation Programs. The Director is charged with various duties, including the obligation to protect the Second Injury Fund under §8(f) of the Act. 33 U.S.C. §908(f). Originally, in the litigation of this case, in the defense of the Fund, the Director opposed a finding of liability. App.45. The administrative law judge awarded benefits to the Claimant but provided protection to the employer through the fund. App.58-60. When the claim reached the Court of Appeals, the Director changed position and argued in favor of the finding of liability. The only justification for this switch is the continuation of the "single-minded compensate-the-employee goal" that permeates the Director's arguments. *Director, O.W.C.P. v. Newport News Shipbuilding and Dry Dock Co. (Harcum),* 514 U.S. 122, 132 (1995). This goal causes the Director to support the holdings of the Benefits Review Board that force employers to disprove all conceivable causes of liability in order to defeat a claim. This is evident from the position of the Federal Respondent in the present case and the holdings of the Board in the present case, *Bath Iron Works*, and *Conoco*.

2. REPLY TO BRIEF IN OPPOSITION BY RESPONDENT JANICH

The brief filed by Janich engages in fantasy by suggesting that the administrative law judge did not believe that §20 shifted the ultimate burden of proof to the employer, even though the administrative law judge appears to have authoritatively cited a Benefits Review Board decision so holding. Jan.Br.12

The argument of Janich cites a line of cases that follow the decision of the D.C. Circuit in *Swinton v. J. Frank Kelly*, 554 F.2d 1075 (D.C. Cir. 1976). Jan.Br. 11-12. This argument requires one to ignore or disregard this Court's holding in *Steadman*, and implies that the phrase "substantial evidence" under the Longshore Act means something different than it means in the other acts containing the same phrase. As argued previously, the entire body of administrative law cannot have varying interpretations of the same phrase. Nor can one administrative body persist in maintaining such a skewed interpretation.

Finally, Respondent Janich joins at the eleventh hour in attempting to discredit Dr. Carroll. It is disingenuous for Janich to imply that Dr. Carroll's opinions contain "a large quantity of obvious lies or nonsense." Jan.Br.13. The doctor's testimony was well within the range of opinions issued every day by qualified specialists in hearings, trials, and depositions on a daily basis, just as were the medical opinions in *Bath Iron Works*. Janich did not seek to strike the opinions of Dr. Carroll on the grounds that they contained lies or nonsense. Janich did not object to the opinions of Dr. Carroll on the grounds that the testimony did not contain competent expert opinions when it was submitted.

Rather, Janich recognized the validity of the testimony and struggled mightily to weaken the opinions of the doctor by use of treatises and extensive cross examination. The attempted use of treatises was rejected by the administrative law judge. App.44. The vigorous cross examination resulted only in the doctor making the admission that he would only be able to render speculative opinions in response to speculative questions. App. 68-69. Neither the administrative law judge nor the reviewing bodies should step in to say that the testimony of the doctor was flawed so badly that the opinions must be disregarded. Five reasonable persons on the Court of Appeals believed the opinions to be substantial evidence. The error occurred as a result of the improper analysis of the court below stemming from the use of an improper standard.

CONCLUSION

For the reasons set forth above and argued previously, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GREGORY PAUL SUJACK
Counsel of Record
DAVID F. BUYSSE
TODD E. WEGMAN
GAROFALO, SCHREIBER
& HART, CHTD.
211 West Wacker Drive
14th Floor
Chicago, Illinois 60606
(312) 670-2000

Attorneys for Petitioners